No. 90-1682

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In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. CATHEY and BETTE CATHEY,
Petitioners

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
DOW CHEMICAL COMPANY, and
MICHAEL H. MADDOLIN,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTION PRESENTED

Is this Court's decision in *Pilot Life Insurance Co. v. Dedeaux* properly read to require preemption of a state law regulating unfair insurance practices, even though § 1144(b)(2)(A) of ERISA expressly saves from preemption "any law of any State which regulates insurance"?

LIST OF PARTIES

The names of all parties to this proceeding appear in the caption of the case.

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JAMES C. CATHEY and BETTE CATHEY,
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vs.

METROPOLITAN LIFE INSURANCE COMPANY,
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MICHAEL H. MADDOLIN,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners, James C. Cathey and Bette Cathey, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas, rendered on January 30, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 34 Tex. Sup. Ct. J. 309 (Janaury 30, 1991), and is reprinted in the Appendix at App. 1-17.

The opinion of the Texas Court of Appeals is reported at 764 S.W.2d 286 (Tex. App.—Houston[14th Dist.] 1988, writ granted), and is reprinted in the Appendix at App. 20-31.

The summary judgment order of the 113th Judicial District Court of Harris County, Texas, dated October 13, 1987, is reprinted in the Appendix at App. 32.

JURISDICTION

The judgment of the Supreme Court of Texas was signed January 30, 1991. (App. 18-19). The jurisdiction of this Court to review the judgment of the Texas Supreme Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

The statutory provisions involved are lengthy. Accordingly, they are reproduced in the Appendix. Their citations are as follows:

(1) Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (App. 33-34);

(2) McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (App. 35);

(3) Texas Insurance Code, art. 21.21 (Vernon 1981 & Supp. 1991)(App. 36-37);

(4) Texas Deceptive Trade Practice-Consumer Protection Act, Tex. Bus. & Com. Code Ann. § 17.50 (Vernon 1987 & Supp. 1991)(App. 38); and

(5) Texas State Board of Insurance Rules and Regulations, 28 Tex. Admin. Code §§ 21.1-4, .201-.205 (West 1988)(App. 39-44).

STATEMENT OF THE CASE

A. Overview

The issue in this case is whether ERISA preempts state law claims based on a statute enacted pursuant to the McCarran-Ferguson Act to regulate unfair insurance practices. In particular, the Court is called on to reconcile ERISA's preemption and saving clauses, considering the sweeping preemptive scope of the former and the express language of the latter that saves from preemption "any law of any State which regulates insurance." 29 U.S.C. § 1144(b)(2)(A). This case also calls on the Court to reexamine and clarify its decision in *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987). In *Pilot Life*, the Court held that a state common law cause of action for bad faith claims handling, which was not based on a "law regulating insurance," was not saved from preemption. The Court went on to hold that the remedies set forth in ERISA were intended to be exclusive and could not be supplemented or supplanted by state law remedies. 107 S.Ct. at 1558. In contrast, in *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380 (1985), and *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990), the Court held that state laws that did regulate insurance were saved from preemption.

The question in this case is which shall prevail — the policy of ERISA exclusivity reflected in the preemption clause or the policy of deferring to state insurance regulation as reflected in the saving clause. The Catheys respectfully submit that the text, history, and purpose of ERISA all support saving from preemption their claims under article 21.21 of the Texas Insurance Code for unfair insurance practices.

B. Factual Background & Procedural History

Because this is a summary judgment case, the facts alleged by the Catheys were taken as true. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The Catheys' summary judgment proof showed that James Cathey was employed as a purchasing agent for Dow Chemical Company and through that employment had health insurance for himself and his wife. In the mid-1970's, Bette Cathey was diagnosed as having multiple sclerosis. In 1979, Bette Cathey began to experience weakness and had difficulty walking. She reached a point where she could not walk without assistance, and she began using a wheelchair. In 1982, Bette Cathey's doctor prescribed in-home nursing for her, and Metropolitan paid for these services.

In May of 1983, James Cathey was given the option of retiring. Mr. Cathey was quite concerned about continued medical coverage for his wife's condition, and he talked with the employee relations manager for Dow. Mr. Cathey was assured that he and his wife were covered under the insurance plan and that they would continue to have the same coverage after he retired. Cathey was given copies of documents purporting to provide "insurance" through Metropolitan, and representatives of both Dow and Metropolitan told Cathey the Dow employee benefit plan was insured by Metropolitan.

In 1985, Metropolitan, acting through its agent Michael H. Maddolin, refused to continue paying for Bette Cathey's nurse, despite the earlier representations. After exhausting all administrative appeals, the Catheys filed suit in Texas state court against Metropolitan, Dow, and Maddolin. The Catheys alleged various state law causes of action, including claims for unfair insurance practice in

violation of article 21.21 of the Texas Insurance Code. The trial court granted summary judgment against the Catheys on the grounds that all their claims were preempted by ERISA.

The Texas Court of Appeals affirmed. *Cathey v. Metropolitan Life Insurance Co.*, 764 S.W.2d 286 (Tex. App.—Houston [14th Dist.] 1988, writ granted)(App. 20-31). The court held that certain of the statutory claims were initially "saved" under 29 U.S.C. § 1144(b)(2)(A) as "laws regulating insurance," but were ultimately preempted by operation of the "deemer" clause of § 1144(b)(2)(B).

The Texas Supreme Court affirmed the lower court decisions, reasoning that even if the Catheys alleged causes of action that would be "saved" because they were based on laws regulating insurance, all such remedies would still be preempted because Congress intended for ERISA to be the exclusive remedy. (App. 1-17).[1]

REASONS FOR GRANTING THE WRIT

The issue in this case is whether the Catheys' state law causes of action under article 21.21 of the Texas Insurance Code are preempted by ERISA. Although the Catheys alleged various causes of action under state law, they limit this appeal to their claims under the Texas Insurance Code, article 21.21, § 16 (Vernon Supp. 1991). The Catheys assert that this cause of action is saved from ERISA preemption, because it is based on a "law regulating insurance," within the meaning of 29 U.S.C. § 1144(b)(2)(A).

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[1] In a separate suit, the Catheys asserted their ERISA claims against the plan but obtained no effective relief. *See Cathey v. Dow Chem. Co. Med. Care Program*, 907 F.2d 554 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 964 (1991).

As with any statutory construction task, understanding ERISA begins with an analysis of the reasons that led Congress to enact this statute. In 1974, Congress culminated years of study and effort by producing the Employee Retirement Income Security Act. Significant findings by Congress that justified federal regulation of employee benefits plans were that "despite the enormous growth of such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits[.]" 29 U.S.C. § 1001(a). Congress sought to provide appropriate remedies, sanctions, and ready access to federal courts and to protect "the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." 29 U.S.C. §§ 1001(b), (c).

From these policy statements and from the legislative history of ERISA, it is apparent that Congress was primarily concerned with safeguarding *pension* benefits, an area where there was no effective state or federal regulation. *See, e.g.*, H.R. 462, 93d Cong., 1st Sess. § 2 (1973), *reprinted in* 1 Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 67-69 (1976) [hereinafter cited as "*Legislative history of ERISA*"]; S.4, 93d Cong., 1st Sess.

§ 2 (1973), *reprinted in* 1 *Legislative History of ERISA* 94-97; S. 1179, 93d Cong., 1st Sess., § 101 (1973), *reprinted in* 1 *Legislative History of ERISA* 230-32; *see also Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989); Note, *Punitive Damages & ERISA: An Anomalous Effect of ERISA's Preemption of Common Law Actions*, 65 Wash. U.L.Q. 589, 589 n. 1, 609 & n. 118 (1987); Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After* Pilot Life Ins. Co. v. Dedeaux, 21 Loy. of L.A.L. Rev. 1343, 1381 n. 303 (1988). Prior to the enactment of ERISA, trust funds were being mismanaged and, in some cases, were being outright plundered. It was this regulatory void that Congress primarily sought to fill. In contrast, health insurance, life insurance, and disability insurance — like all other types of insurance — were subject to broad, substantial state regulation. For example, the Texas Insurance Code provision at issue in this case traces its lineage back to 1909. *See* Tex. Ins. Code Ann. art 21.21 historical note (Vernon 1981). There was no regulatory vacuum for Congress to fill with regard to these types of employee benefits, because effective state regulation already existed.

This Court has recognized that it is established federal policy to leave insurance regulation to the states. Initially, the view was that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 8 Wall. 168, 183 (1869), *quoted in Securities & Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453, 458 (1968). "Consequently, regulation of insurance transactions was thought to rest exclusively with the states." *SEC v. Nat'l Sec.*, 393 U.S. at 458.

In 1944, the Court upset this traditional view by holding, in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), that insurance transactions did affect commerce and were, therefore, subject to federal

regulation. Congress reacted immediately by passing the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15. As the Court stated in *Securities & Exchange Commission v. National Securities, Inc.*:

> ... Congress clearly remained concern about the inroads the Court's decision might make on the tradition of state regulation of insurance. The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in the first section; Congress declared that "the continued regulation and taxation by the several states of the business of insurance is in the public interest." 59 Stat. 33 (1945), 15 U.S.C. § 1011. As this Court said shortly afterward, "[o]bviously Congress's purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429 (1946).

393 U.S. at 458. To fulfill this purpose, § 1012 of the McCarran-Ferguson Act provides:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance[.]

15 U.S.C. §1012.

When Congress enacted ERISA in 1974, far from upsetting this traditional balance, Congress explicitly preserved it. Although Congress enacted the broad preemption clause providing the ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employment benefit plan[.]" 29 U.S.C. § 1144(a), this preemption clause was expressly limited by the "saving clause," which states that "nothing in this subchapter shall be construed to exempt or relieve any person from *any law of any State which regulates insurance[.]*" § 1144(b)(2)(A) (emphasis added). The saving clause, in turn, is limited by the "deemer clause." § 1144(b)(2)(B).[2] This Court has explained the interaction of these provisions as follows:

> To summarize the pure mechanics of the provisions quoted above: If a state law "relate[s] to...employee benefit plan[s]," it is pre-empted. ... The saving clause excepts from the preemption clause laws that "regulat[e] insurance." . . . The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company....

Pilot Life Ins. Co. v. Dedeaux, 107 S.Ct. 1549, 1552 (1987).

With regard to the evident conflict between the broad preemption and broad saving clause, the Court said in *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380 (1985):

[2] Benefit "plans" are distinct legal entities. 29 U.S.C. § 1132(d). To make sure the plans themselves are not subject to direct state regulation by laws otherwise saved from preemption, the deemer clause provides: "Neither an employee benefit plan ..., nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State law purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." 29 U.S.C. § 1144(b)(2)(B).

> Nonetheless, the sphere in which [§ 1144(a)] operates was explicitly limited by [§ 1144(b)(2)(A)]. The insurance savings clause preserves any state law "which regulates insurance, banking, or securities." The two preemption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general preemption clause broadly preempts state law, the saving clause appears to broadly preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time....
>
> Fully aware of this statutory complexity, we still have no choice but to "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."... We must also assume that Congress did not intend to preempt areas of traditional State regulation....

105 S.Ct. 2389 (footnote and citations omitted).

Thus, while the preemption language of ERISA is broad, this Court has recognized that the preemption clause is explicitly limited by the saving clause, which preserves any State law that "regulates insurance." In fact, this Court has expressly recognized that the expansiveness of the preemption clause "gave the insurance saving clause a much more significant role, as a provision that saved an entire body of law from the sweeping general preemption clause." *Metropolitan*, 105 S.Ct. at 2392 n. 23.

The similarity between the language of the

McCarran-Ferguson Act and ERISA's saving clause makes it apparent that the latter was "designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States." *Metropolitan,* 105 S.Ct. at 2391 n. 21.

The revisions the ERISA preemption clause went through prior to final passage are also significant. The preemption clause at first only preempted state laws dealing with subjects regulated by ERISA. At the last minute, the preemption clause was significantly broadened to preempt all state laws to the extent they "relate to" an employee benefit plan. *Metropolitan,* 105 S.Ct. at 2392. Nothing in the legislative history suggests "that the preemption provision was broadened out of any concern about state regulation of insurance contracts, beyond a general concern about potentially conflicting state laws." *Id.* at 2392 n. 23.

II.

Against this federal backdrop of the McCarran-Ferguson Act policy of preserving state regulation of insurance and ERISA's explicit endorsement of that policy by virtue of the saving clause, appear statutes such as article 21.21 of the Texas Insurance Code. This statute explicitly states:

> The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by

> prohibiting the trade practices so defined or determined.

Tex. Ins. Code Ann. art. 21.21, § 1 (Vernon 1981) (*reprinted at* App. 36). Of course, the Act of Congress referred to is the McCarran-Ferguson Act.

Article 21.21 comprehensively regulates unfair practices by insurers, and provides for both enforcement by the state and private causes of action. *See* art. 21.21, §§7, 14, 15, 16, 17. Article 21.21, § 16 grants a private cause of action to any "person" who has sustained actual damages as a result of: (1) practices declared in article 21.21, § 4 to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance; (2) acts and practices declared in rules and regulations adopted by the State Board of Insurance under article 21.21 to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance; and (3) practices defined by § 17.46 of the Texas Deceptive Trade Practices — Consumer Protection Act as unlawful deceptive trade practices. (*See* App. 36).[3]

A brief review of the statutory provisions will show just how comprehensive the state's regulation is. The first source of actionable conduct is article 21.21, § 4. This includes subsections (1) and (2), which broadly prohibit all forms of misrepresentations and false advertising relating to insurance. Other subsections prohibit defamation, boycotts, false financial statements, unfair rate discrimina-

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[3] The Texas Supreme Court on several occasions has outlined the categories of actionable conduct under art. 21.21, § 16. *See Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 131-36 (Tex. 1988); *Chitsey v. National Lloyd's Ins. Co.*, 738 S.W.2d 641, 642-43 (Tex. 1987); *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 691-92 (Tex. 1979).

tion, rebates, and other conduct relating to the business of insurance. Tex. Ins. Code Ann. art. 21.21, § 4(1)-(9).[4]

Article 21.21 also incorporates by reference the prohibitions contained in another statute, the Texas Deceptive Trade Practices — Consumer Protection Act, specifically § 17.46 of that statute. The latter statute prohibits false, misleading, and deceptive acts or practices. Tex. Bus & Com. Code Ann. § 17.46 (Vernon 1987)(*See* App. 38).

Finally, rules and regulations promulgated by the Texas State Board of Insurance are an important source of prohibitions that are actionable under article 21.21. For example, a key regulation has been Board Order 41060, which is codified as 28 Tex. Admin. Code § 21.1-5 (West 1988) (App. 39-40), and which provides that "[n]o person shall engage in this state in any trade practice that is a misrepresentation of an insurance policy, that is an unfair method of competition, or that is an unfair or deceptive act or practice as defined by the provisions of the Insurance Code or as defined by these sections and other rules and regulations of the State Board of Insurance authorized by the Code." 28 Tex. Admin. Code § 21.3 (App. 39). The same Board Order then broadly defines prohibited misrepresentations in the business of insurance. *Id.* § 21.4 (App. 40). This Board Order also serves as a gateway to other provisions relating to unfair claims settlement practices, such as article 21.21-2 of the Texas Insurance Code and Board

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[4] Cases involving conduct in violation of art. 21.21, § 4 include *Hope v. Allstate Ins. Co.*, 719 S.W.2d 634, 637-38 (Tex.App.—Ft. Worth 1986, *writ ref'd n.r.e.); Caniu v. Western Fire & Cas. Co.*, 716 S.W.2d 737, 741 (Tex. App.—Corpus Christi 1986), *writ ref'd n.r.e. per curiam*, 723 S.W.2d 668 (Tex. 1987); *American Ins. Cos. v. Reed*, 626 S.W.2d 898, 903 (Tex.App.—Eastland 1981 no writ); *Russell v. Hartford Cas. Ins. Co.*, 548 S.W.2d 737, 742 (Tex.Civ.App.—Austin 1977 writ ref'd n.r.e.).

Order 41454, 28 Tex. Admin. Code §§ 21.201-.205. (App. 41-44).[5] Although article 21.21, § 16 was enacted in 1973, it arose from previous statutes dating back to 1909, which further supports the traditional state role in regulating insurance, as recognized by the McCarran-Ferguson Act.

The Catheys specifically alleged causes of action under article 21.21, but the state courts held these claims were preempted by ERISA.

III.

A preliminary question under this Court's ERISA preemption analysis is whether the state law at issue "regulates insurance." If a law "regulates insurance," then it fits within the saving clause of § 1144(b)(2)(A) and should not be preempted. On the other hand, if the law does not "regulate insurance" then there is no basis for escaping preemption under § 1144(a).[6]

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[5] These unfair claims settlement practices provisions are patterned after a uniform model act promulgated by the National Association of Insurance Commissioners. *See Blind Faith*, supra, at 1393-84 & n. 313.

[6] A prior inquiry, of course, is whether the claims even "relate to" an ERISA plan in order to come within the preemptive scope of § 1144(a). The Texas courts correctly held that the Catheys' causes of action asserting improper claims handling "related to" the plan and thus would initially come within the preemption clause, *See Pilot Life*, 107 S.Ct. at 1553. However, there is a serious question as to whether all claims under art. 21.21 would "relate to" the plan. For example, the Catheys also alleged that representatives of both Metropolitan and Dow represented that the Catheys were insured under an insurance policy issued to Dow by Metropolitan and would continue to have the same coverage even after Mr. Cathey retired. Metropolitan's subsequent conduct in cutting off benefits for Mrs. Cathey's nursing rendered this prior representation false. (cont.)

In *Pilot Life v. Dedeaux,* the Court adopted a two-step analysis for determining whether a particular state law "regulates insurance." The first step is a "common-sense" test that requires that, to regulate insurance, a law must not just have an impact on the insurance industry but must be specifically directed toward that industry. 107 S. Ct. at 1554. Article 21.21 clearly satisfies this test. Article 21.21, of course, appears in the Insurance Code and has as its express purpose regulating trade practices "in the business of insurance."

It is clear that article 21.21 "regulates insurance," within the meaning of the ERISA saving clause. In *SEC v. National Securities,* this Court defined the "business of insurance" as follows:

> . . . Certainly the fixing of rates is part of this business; that is what *South-Eastern Underwriters* was all about. The selling and advertising of policies...and the licensing of companies and their agents...are also within the scope of the statute. Congress was concerned with the type of

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(Footnote 6 continued)

In *Metropolitan v. Massachusetts,* this Court held that "laws that regulate only the insurer, or the way in which it may sell insurance, do not 'relate to' benefit plans in the first instance." 105 S.Ct. at 2390. Hence, "[b]ecause they would not be preempted by [§ 1144(a)], they do not need to be 'saved' by [§ 1144(b)(2)(A)]." *Id.* Article 21.21 contains broad prohibitions and regulations of many types of conduct relating to only the insurer and the way in which it may sell insurance. To this extent, there should be no preemption initially, because such claims do not "relate to" administration of the plan. If complaints about misrepresentations made in initially selling the policy would not "relate to" the plan, then the Catheys' complaint about the false representations of insurance coverage that were made prior to the time their claims were denied likewise should not "relate to" the plan.

> state regulation that centers around the contract of insurance, the transaction which *Paul v. Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was — it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

393 U.S. at 460 (citations omitted). In *Metropolitan*, this Court expressly embraced this definition when construing ERISA's saving clause. 105 S.Ct. at 2391.

As previously set forth, article 21.21 regulates the fixing of rates by prohibiting discrimination and rebates, regulates selling and advertising of policies, and most importantly clearly regulates the relationship between the insurer and insured and the enforcement of policies, and thus clearly regulates the "business of insurance."

The second test under *Pilot Life v. Dedeaux* is the three-part standard under cases construing the McCarran-Ferguson Act. Under that test, whether a practice fits within the "business of insurance" depends on:

> *First*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of

> the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry.

107 S. Ct. at 1553-54 (*quoting Union Labor Life Ins. Co. v. Pireno,* 102 S. Ct. 3002, 3009 (1982)).

As shown by the preceding analysis, article 21.21 clearly fits the second criterion. Article 21.21, by prohibiting misrepresentations, unfair settlement practices, and other unfair insurance practices, clearly regulates an integral part of the relationship between the insurer and insured by governing the reliability, interpretation, and enforcement of insurance policies, which this Court said was core of the "business of insurance." As previously discussed, article 21.21 is specifically aimed toward the insurance industry and thus satisfies the third criterion. To the extent that article 21.21 prohibits misrepresentations and thus requires insurers to pay benefits that have been promised, article 21.21 also satisfies the first criterion by shifting the risk from the insured to the insurer, as any statute requiring an insurer to pay claims would do. Even if the first criterion is not clearly met, no one factor is necessarily determinative. *Pireno,* 102 S. Ct. at 3009. Article 21.21 fits the other criteria so well, and satisfies the "common sense" standard so clearly, that the statute is undeniably one that "regulates insurance." The Court of Appeals in this case had no difficulty concluding that article 21.21 was a law regulating the "business of insurance" (App. 26), and the Texas Supreme Court did not dispute this holding. (App. 7-8). Another opinion that also correctly recognizes that article 21.21 fits within the saving clause as a law regulating insurance is *Mayfield v. Hartford Life Ins. Co.,* 699 F.Supp. 605 (W. D. Tex. 1988); *cf. Goodrich v. General Tel. Co. of Calif.,* 195 Cal. App.3d 675, 241 Cal. Rptr. 640, 644-45 (Cal. App. 1987) (reaching same conclusion regarding similar provision of California Insurance Code), *overruled sub.*

nom. Commercial Life Ins. Co. v. Superior Court, 47 Cal. 3d 473, 764 P.2d 1059, 253 Cal. Rptr. 682 (1988); *Soniat v. Travelers Ins. Co.*, 538 So.2d 210, 214-15 (La. 1989) (reaching same conclusion regarding Louisiana statute).[7]

Because article 21.21 clearly is a law that "regulates insurance" it fits within the plain language of ERISA's saving clause and thus should be saved from preemption. Under this Court's holdings in *Metropolitan Life Insurance Co. v. Massachusetts* and *FMC Corp. v. Holliday*, that should end the inquiry. In both cases, once the Court determined that a particular state law regulated insurance, the Court concluded that such laws were not preempted by ERISA.

IV.

The problem is this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*. In that case, the Court applied the same analysis to find that the Mississippi common law cause of action for bad faith claims handling was not a law regulating insurance and thus would not be saved from preemption. 107 S.Ct. at 1554-55. However, the Court went on to hold that allowing an additional state law remedy for unfair claims handling would be inconsistent with the purpose of ERISA to establish a uniform federal policy;

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[7] *But see Ramirez v. Inter-Continental Hotels*, 890 F.2d 760 (5th Circuit 1989); *McManus v. Travelers Health Network of Texas*, 742 F.Supp. 377 (W.D.Tex. 1990). These latter two cases both hold that art. 21.21 is not a law "regulating insurance." The analysis in *Ramirez* is flawed, because that court focused almost exclusively on the portion of art. 21.21 that incorporates the general deceptive trade practices provision in DTPA § 17.50, while largely ignoring the provisions of art. 21.21 that specifically and exclusively regulate insurance practices. *See* 890 F.2d at 763. *McManus* simply followed and perpetuated the errors of *Ramirez*.

therefore, the Court held that any supplemental remedies under state law would be preempted. *Id.* at 1555-58. It is this "exclusive remedy" holding from *Pilot Life* that is at issue. Based on that holding, the Texas Supreme Court in this case held that even if article 21.21 were saved from preemption, as a law regulating insurance, the statute would nevertheless be preempted because ERISA was intended to provide the exclusive remedy. (App. 8). In so holding, the Texas Supreme Court joined several other courts that have decided that, notwithstanding the clear language of the saving clause in ERISA, even if a state law does regulate insurance and would be saved from preemption, such laws are nevertheless preempted under the "exclusive remedy" holding of *Pilot Life. See, e.g., Ramirez v. Inter-Continental Hotels,* 890 F.2d 760 (5th Cir. 1989); *McManus v. Travelers Health Network of Texas,* 724 F.Supp. 377 (W.D.Tex. 1990); *Multicare Health Care Serv., Inc. v. General Am. Life Ins. Co.,* 720 F. Supp. 581 (N.D. Tex. 1989); *Kanne v. Connecticut General Life Ins. Co.,* 867 F.2d 489 (9th Cir. 1988), *cert. denied,* 109 S. Ct. 3216 (1989); *Roberson v. Equitable Life Assur. Soc'y,* 661 F. Supp. 416 (C.D. Cal 1987).[8]

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[8] Prior to *Pilot Life,* a number of courts had held that various state insurance laws were not preempted. *See Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985) (Massachusetts mandated benefit law); *Northern Group Services, Inc. v. Auto Owners Ins. Co.,*833 F.2d 85 (6th Cir. 1987), *cert. denied,* 108 S.Ct. 1754 (1987) (Michigan No-Fault Automobile Insurance Act); *Graves v. Blue Cross of California,* 688 F.Supp. 1405 (N.D.Cal. 1988)(California unfair insurance practices act); *Simmons v. Prudential Ins. Co. of America,* 641 F.Supp. 675 (D. Colo. 1986) (Colorado Unfair Competition-Deceptive Practices Act); *Kanne v. Connecticut Gen. Life Ins. Co.,* 607 F.Supp. 899 (C.D. 1985) (California unfair insurance practices act), *reversed,* 867 F.2d 489 (9th Cir. 1988); *Presti v. Connecticut Gen. Life Ins. Co.,* 605 F.Supp. 163 (N.D. Cal. 1985) (California unfair insurance practices act); *Eversole v. Metropolitan Life Ins. Co.,* 500 F.Supp. 1162 (C.D. Cal. 1980) (California unfair insurance practices act).

The Catheys are aware of only one case decided after *Pilot Life* that holds a state unfair insurance practices law that clearly fit within ERISA's saving clause was in fact saved from preemption, in accord with the plain language of ERISA. *See Goodrich v. General Tel. Co. of Calif.*, 195 Cal. App. 3d 675, 241 Cal. Rptr. 640 (1987), *overruled sub. nom., Commercial Life Ins. Co. v. Superior Court*, 47 Cal. 3d 473, 764 P.2d 1059, 253 Cal. Rptr. 682 (1988). The *Goodrich* and *Roberson* cases provide paradigms of the competing views of post-*Pilot Life* preemption of state laws regulating unfair insurance practices. *See generally Blind Faith*, supra, at 1386-96; Note, *No Faith in Bad Faith*, 41 Hastings L.J. 201, 218-21 (1989). The *Goodrich* opinion adopts what the Catheys believe is the correct view.

The *Goodrich* court relied on the plain language of § 1144(b)(2)(A) and refused to find "an unspoken exception to the insurance saving clause." 241 Cal. Rptr. at 648. In response to the view that a state insurance law could be preempted even if the saving clause apparently shielded the statute from preemption, the *Goodrich* court said:

> ...We have great difficulty with the concept section 790.03(h) can be both within and without the scope of the preemption clause. The concept is not only illogical but in direct conflict with the unambiguous language of the statute. Section 1144(b)(2)(A) states, "*...nothing in this subchapter shall be construed* to exempt or relieve any person from any law of any State which regulates insurance...." (Italics added.) The civil enforcement provisions of ERISA are contained in subchapter I, the same subchapter as the savings clause. Thus, even assuming the ERISA civil enforcement provisions could otherwise be construed to be the exclusive remedy for plaintiffs asserting improper processing of claims, Congress has specifically prohibited such a construction when the plaintiffs rely on a state law

regulating insurance.

Id.

It is arguable that *Pilot Life* could be limited to its facts. Afer all, what was at issue was a common law cause of action that clearly did not satisfy the test of regulating the "business of insurance." The Court's exclusive remedy holding could then be limited to state laws that did not regulate insurance. The problem with that approach is that once the Court decided the Mississippi common law claim did not regulate insurance, there was no reason to go further and hold that any state law remedies would be preempted as being inconsistent with ERISA. Moreover, the broad language used by the Court makes it implausible to argue that the exclusive remedy holding can be read narrowly. For example, the Court said:

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive. This conclusion is fully confirmed by the legislative history of the civil enforcement provision.

107 S. Ct. at 1556-57. SImilarly, the Court concluded by holding:

> Considering the common-sense understanding of the saving clause, the McCarran-Ferguson Act factors defining the business of insurance, and, most importantly, the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive, we conclude that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by [§ 1144(a)].

Id. at 1558. Because of this broad language from *Pilot Life*, it is necessary for petitioners to challenge the Court's analysis in that case, at least to the extent that subsequent courts have read the exclusive remedies holding to extend even to laws that would otherwise be saved from preemption.

V.

It is unnecessary and improper to view *Pilot Life* as a definitively resolving in the conflict between the competing policies of uniform federal regulation as promoted by the preemption clause and preserving state regulation of insurance as provided in the saving clause. Because the common law cause of action at issue in *Pilot Life* was not within the saving clause, the conflict between these two provisions was not squarely drawn. There are a number of reasons that an overly broad reading of *Pilot Life* is unwarranted.

A primary reason why it is wrong to preempt laws that fit within the saving clause is because doing so is inconsistent with the plain language of ERISA. Courts are to interpret legislation, first and foremost, according to its plain meaning, and express terms of a statute must supersede any implied terms. *See Mead Corp. v. Tilley*, 109 S. Ct. 2156, 2162 (1989); *Bank of America v. United States*, 462 U.S. 122, 128 (1982). This Court has expressly recognized that the preemption clause is substantially qualified by the saving clause. *Metropolitan v. Massachusetts*, 105 S. Ct. at 2385. The Court also recognized that it had "no choice but to 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Id.* at 2389. In *Metropolitan* the Court recognized the "new prominence of the saving clause in light of the rewritten preemption clause" and the "significant role" of the saving clause as saving "an entire body of law from the sweeping general preemption clause." *Id.* at 2392 & n. 23. In *Metropolitan* the Court concluded that it should "decline to impose any limitation on

the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it." *Id.* at 2392-93. If a state law 'regulates insurance,' ... it is not preempted. Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause[.]" *Id.* at 2393.

While the Court acknowledged that this view of the saving clause created a distinction between insured and uninsured plans and even created disuniformities, this was the "inevitable result of congressional intent to 'save' local insurance regulation." *Id.* at 2393. The Court recognized that the wisdom of this balancing was for Congress. The broad reading of *Pilot Life* adopted by the Texas Supreme Court violates each of these precepts.

The preemption and saving clauses of ERISA reflect two competing but equally fundamental policies. On the one hand, Congress wanted to provide for uniform regulation of benefit plans; on the other hand, Congress showed no inclination to upset a century old federal policy of deferring to state regulation of insurance. Notwithstanding *Pilot Life*, this Court reaffirmed in *FMC Corp. v. Holliday* the importance of the saving clause as returning to the states the power to enforce those state laws that "regulate insurance," except as provided in the deemer clause. 111 S. Ct. at 407. The Court reached this conclusion in *FMC Corp. v. Holliday* despite recognizing that it indirectly bound the ERISA plan to potentially varying state insurance regulations as they applied to the plan's insurer. *Id.* at 408.

To hold that a statute regulating insurance, although explicitly saved by § 1144(b)(2)(A), is nevertheless preempted, out of a concern over congressional desire for uniformity would be to read the preemption clause so broadly as to ignore the saving clause. As this Court recently recognized in connection with another issue arising under ERISA:

> "[N]o legislation pursues its purpose at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever further the statute's primary objective must be the law."

Pension Benefit Guaranty Corp. v. LTV Corp., 110 S. Ct. 2668, 2667 (1990).

In this instance, Congress desired uniformity, as expressed by the preemption clause, but Congress itself set the limit on that uniformity by also enacting the saving clause. The lack of uniformity that results from saving state laws regulating insurance is a consequence that Congress drafted into the statute in order to serve the countervailing interest of preserving traditional state insurance regulation. If Congress had intended to take insurance regulation from the States, it certaintly would not have done so by using language like ERISA's saving clause, which expressly saves from preemption state laws regulating insurance. *See Blind Faith*, supra, at 1382 & n. 311.

Another problem with reading *Pilot Life* as the Texas Supreme Court did is that preempting laws regulating insurance would also violate ERISA § 1144(d), which provides that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States[.]" 29 U.S.C. § 1144(d). *see Shaw v. Delta Air Lines, Inc.*, 103 S.Ct. 2890, 2902-05 (1983). If state insurance laws are preempted by ERISA, that would clearly invalidate or impair the provisions of the McCarran-Ferguson Act, which provided that the business of insurance shall be subject to the laws of the several states and that no Act of Congress shall be construed to invalidate, impair, or supersede any state laws

regulating the business of insurance. 15 U.S.C. §§ 1011-12. Such an interference with the policies underlying the McCarran-Ferguson Act would be especially inappropriate, considering that ERISA's explicit saving clause derived from the policy concerns that gave rise to the McCarran-Ferguson Act.

As this Court has recognized more than once, "ERISA preemption analysis 'must be guided by respect for the separate spheres of governmental authority preserved in our federalist system.'" *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2221 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 101 S. Ct. 1895, 1905 (1981). Given the history of state insurance regulation as recognized in *SEC v. National Securities* and *Metropolitan v. Massachusetts*, and as specifically embraced by the McCarran-Ferguson Act, preempting state regulation of unfair insurance practices would be a massive and unwarranted shift of power from the States to the federal system that would severely undermine the principles of federalism espoused in *Fort Halifax* and *Alessi*.

Such a massive shift of power is especially unwarranted in light of the legislative history of ERISA. As this Court recognized in *Metropolitan v. Massachusetts*, nothing in the legislative history suggests "that the preemption provision was broadened out of any concern about state regulation of insurance contracts, beyond a general concern about 'potentially conflicting state laws.'" 105 S. Ct. at 2392 & n. 23. In fact, it is significant that the legislative history of ERISA does not discuss the relationship between the preemption and saving clauses, and scarcely mentions the saving clause at all. *See id.* This lack of discussion is further evidence that ERISA in general, and the preemption clause specifically, were not intended to interfere with the long-established principle of leaving

insurance regulation to the States. Surely Congress would have generated volumes of discussion and debate before discarding over a century of legal precedent and so fundamentally shifting the balance of power in insurance regulation from the States to the federal government. *See* Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57, 115-16 (1976).

It is also important to recognize that the desire of Congress for uniform regulation is subordinate to the primary goal of ERISA, which was to protect and promote the interests of employees and their beneficiaries in employee benefit plans and to protect their contractually defined benefits. *Firestone v. Bruch*, 109 S. Ct. 948, 955 (1989). "[T]he purpose of Congress is the ultimate touchstone." *Ft. Halifax Packing Co. v. Cayne*, 107 S. Ct. 2211, 2216 (1987); *Metropolitan*, 105 S. Ct. at 2393. Any congressional desire for uniform enforcement, and any congressional desire to save state laws regulating insurance must be read in light of, and in deference to, this primary goal. In *Firestone v. Bruch*, this Court refused to adopt a reading of ERISA "that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id* at 956. Likewise, and especially in light of the explicit language of ERISA's saving clause, this Court should not allow an interpretation that preempts state insurance laws that provide additional protections to employees and their beneficiaries from unfair insurance practices committed by insurers, even when those insurers provide coverage to ERISA plans. There is no support in the legislative history of ERISA for the conclusion that Congress intended to reduce the state law protections provided to employees and their beneficiaries against unfair insurance practices committed by entities other than the plan itself.

Congress already struck what it considered the appropriate balance between uniformity of regulation and preservation of state insurance laws. As this Court recognized in *Metropolitan v. Massachusetts* and *FMC Corp. v. Holliday,* insurers remain fully subject to all state laws regulating insurance, but the deemer clause shields the plan itself from direct regulation. It makes sense that Congress would strike the balance as it did. Employers who might be inclined to create employee benefit plans could be deterred and daunted by the prospect of facing conflicting state regulations. In this light, it makes sense to shield plans by virtue of the deemer clause from direct regulation. However, the same reasoning does not apply to insurance companies. For over a century insurers have already been subjected to pervasive state regulation, along with the variations that naturally arise when complying with the laws of fifty different jurisdictions. Nevertheless, the insurance industry has coped and even thrived. There is no practical justification for shielding these insurers from the same state regulations merely because they happen to be insuring an ERISA plan rather than some other person or entity.

Another policy reason for refusing to read *Pilot Life* to preempt state laws that regulate insurance is the comparative harm suffered by beneficaries as a result of preemption. Permitting suits against plan insurers does not disrupt uniform administration of the plan, because the deemer clause continues to shield the plan from conflicting state laws and remedies. Only the insurer is affected, and insurers, to put it simply, are used to such regulation. On the other hand, denying employees and their beneficiaries relief against insurers for unfair insurance practices severely restricts the States' ability to effectively regulate insurers and substantially restricts the availability of meaningful relief.

Consider for example an insured employee who requires chemotherapy and a bone marrow transplant to

treat cancer. However, the treatment can be effective only if rendered during a brief period while the cancer is in remission. Without the treatment, the insured will certainly die; with it, she will live. Although prevailing medical consensus is to the contrary, the insurer arbitrarily and capriciously denies coverage, claiming the procedure is "experimental" and thus not medically necessary. Of course, the employee can sue under ERISA for benefits due and a declaration of her right to future benefits. 29 U.S.C. § 1132. However, because of the limited window of opportunity, the insured dies because of lack of treatment before a remedy under ERISA, which requires exhaustion of administrative appeals, can be obtained. Under this hypothetical, ERISA would provide no relief. Benefits no longer do the insured any good, and extra-contractual damages are unavailable, based on this Court's holding that remedies under ERISA are exclusive. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S. Ct. 3085, 3092-93 (1985). Only under state insurance laws would there be any remedy. ERISA gives no remedy even though the insurer's wrongful conduct caused the insured's death. This is hardly a result that could have been intended by Congress when it enacted ERISA to protect employees and their beneficiaries, but this lack of a remedy is precisely the result that would follow from the reading of *Pilot Life* adopted in this case and many others. ERISA provides the exclusive remedy, but in many cases ERISA provides no remedy.

The present case provides another example. Under ERISA, the denial of the Catheys' claim was upheld as to the plan itself. *Cathey v. Dow Chemical Co. Med. Care Program*, 907 F.2d 554 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 964 (1991). Under the broad view of *Pilot Life* taken by the Texas Supreme Court in this case, the Catheys have no state law remedy for the misrepresentations by the other parties of the benefits due.

CONCLUSION

Congress enacted ERISA in 1974 for the purpose of protecting the interests of employees and their beneficiaries in employee benefit plans. As is apparent from the language of the preemption, saving, and deemer clauses, Congress intended to achieve this protection while preserving the traditional role of states in regulating insurance.

Despite the laudable purpose that launched ERISA, and despite the express statutory language preserving state regulation, a growing number of courts have applied this Court's holding in *Pilot Life* to deny all state remedies for unfair insurance practices. ERISA has been converted from a shield intended to protect employees to a sword that allows insurers to avoid liability. This could hardly be what Congress intended, in light of the legislative history, express statutory language, and stated purpose of ERISA. This can hardly be what this Court intended, considering the recognition of state primacy in insurance regulation recognized in *Metropolitan v. Massachusetts* and *FMC Corp. v. Holliday.* This Court has already received numerous certiorari petitions asking for reconsideration of *Pilot Life* and no doubt will receive many more until either this Court or Congress responds. The Catheys ask the Court to grant this petition.

ERISA impacts literally millions of Americans who are employees or beneficiaries covered by benefit plans.[9] For these people, unfortunately, the following criticism of

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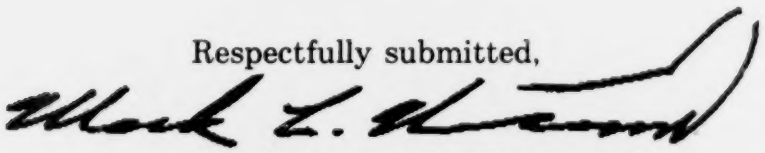
[9] When ERISA was enacted in 1973, Congress estimated that more than 30 million American workers were affected. 1 *Legislative History of ERISA*, at iii. Since that date, the estimate of affected persons has increased to over 100 million. *See Blind Faith, supra*, at 1346 & n. 16; *No Faith, supra*, at 209-10.

ERISA holds true: "The ERISA quicksand is fast swallowing up everything that steps in it or near it. This morass serves as the stage for a theater of the absurd." *Jordan v. Reliable Life Ins. Co.*, 694 F. Supp. 882, 827 (N.D. Ala. 1988). The same court added: "There is a growing phalanx of courts expressing the fear that ERISA will continue to expand and to preempt everything in its meandering path. Only Congress or the Supreme Court can rescue us from the quicksand." *Id.* at 835.

The Catheys pray that the Court will use this case as the vehicle for extricating them, and the millions like them, from this ERISA quicksand. The Catheys respectfully pray that their petition be granted and that this Court reverse the judgment of the court below and hold that claims under article 21.21 of the Texas Insurance Code are saved from ERISA preemption.

Respectfully submitted,



JAMES C. CATHEY, JR. and
BETTE CATHEY, Petitioners

APPENDIX A

IN THE SUPREME COURT OF TEXAS

NO. C-8323

JAMES C. CATHEY and	§	
BETTE CATHEY	§	
Petitioners	§	FROM HARRIS
	§	COUNTY
v.	§	
	§	FIRST DISTRICT
METROPOLITAN LIFE	§	
INSURANCE CO., DOW	§	
CHEMICAL CO. and	§	
MICHAEL H. MADDOLIN	§	
Respondents	§	
	§	

OPINION

This is an appeal in a case involving "ERISA," the Employees' Retirement Income Security Act of 1974. 29 U.S.C. §§ 1001-1461 (1988). An employee and his wife brought state law claims against his employer and its insured for alleged wrongful denial of a claim for in-home nursing care. The trial court granted a summary judgment to the defendants. The court of appeals affirmed the judgment of the trial court. 764 S.W.2d 286. We are called upon to decide whether causes of action stated under: 1) article 21.21, section 16 of the Texas Insurance Code; 2) section 17.50(a)(4) of the Texas Deceptive Trade Practices Act; and 3) article 3.62 of the Texas Insurance Code are superseded by the provisions of ERISA. We hold that ERISA preempts these causes of action in this case. We therefore affirm the judgment of the court of appeals.

FACTS

Because this is a summary judgment case, the facts shown by the Catheys are taken as true. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). James Cathey was employed as a purchasing agent for Dow Chemical Company ("Dow") from 1973 to 1983. During his tenure at Dow, Cathey was told by Dow representatives that he and his wife, Bette Cathey, were covered by a group insurance plan (the Dow plan). In the mid-1970's Bette Cathey was diagnosed with multiple sclerosis, and her condition worsened so that eventually she could no longer walk without assistance. In 1982, Bette Cathey's physicians ordered home nursing care for her. These expenses were paid for under the group insurance plan covering Dow employees. In 1985, Metropolitan Life Insurance Company ("Met"), acting as the claims administrator for the Dow plan, refused to continue paying for the nursing care. Cathey contacted Michael Maddolin, group claim consultant with Met, who told him that there was no medical necessity for nursing care for Bette Cathey.

The Catheys filed suit against Dow, Met, and Michael Maddolin alleging common law and statutory causes of action; no ERISA causes of action were stated. The trial court found each cause of action to be preempted by ERISA and, following the Catheys' refusal to amend their petition to state an ERISA cause of action,[1] rendered summary judgment in favor of Dow, Met, and Maddolin. The court of appeals affirmed that judgment.

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[1] The Catheys filed a separate ERISA suit against the Dow Chemical Company Medical Care Program during the pendency of this action. We note that the Fifth Circuit handed down its decision in that case on August 3, 1990, holding that the Catheys were entitled to partial recovery on their ERISA claim. *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554 (5th Cir. 1990).

ERISA

The Employee Retirement Income Security Act of 1974 subjects employee benefit plans to federal regulation. The act regulates both pension plans and welfare plans that provide benefits for contingencies such as illness, accident, disability, death, or unemployment. While it provides standards and rules governing reporting, disclosure, and fiduciary responsibility for pension and welfare plans, ERISA does not mandate any particular benefits. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983).

Section 1144(a) of ERISA provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.

This section is informally known as the "preemption" provision of ERISA. It is narrowed in scope by subsection 1144(b)(2)(A), commonly known as the "saving" clause:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.

Subparagraph 1144(b)(2)(B), the "deemer" clause, modifies the saving clause by providing that no employee benefit plan:

> shall be deemed to be an insurance company or other insurer . . . for purposes of any law of any state purporting to regulate insurance companies.

The operation of these provisions has been succinctly explained by the United States supreme Court:

> To summarize the pure mechanics of the provisions quoted above:
> If a state law "relate[s] to . . . employee benefit plan[s]," it is pre-empted. The saving clause excepts from the pre-emption clause laws that "regulat[e] insurance." The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company. (citations omitted).

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

Section 1001(b) of Title 29 declares that it is the policy of ERISA to protect:

> the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b) (1988). In *Pilot Life,* the Supreme Court explained that the preemption provision of ERISA was intended to have the effect of "reserv[ing] to Federal authority the sole power to regulate the field of employee benefit plans." 481 U.S. at 46 (quoting Representative Dent, 120 Cong. Rec. 29197 (1974)).

THE DISPUTE

The Catheys contend that misrepresentations made

by representatives of both Dow and Met are actionable under the Texas Insurance Code and Deceptive Trade Practices Act ("DTPA"). They argue that their claims do not "relate to" an employee benefit plan and thus are not preempted. In the alternative, the Catheys assert that even if their claims do relate to an employee benefit plan within the meaning of the preemption provision, they are preserved by the saving clause as laws regulating insurance.

Dow, Met, and Maddolin assert that section 16 of article 21.21 and article 3.62 of the Texas Insurance Code, and section 17.50(a)(4) of the DTPA are state laws that "relate to" an ERISA plan and are therefore preempted. They further contend that the causes of action alleged by the Catheys are not saved from preemption by the saving clause because they conflict with the civil enforcement scheme provided in ERISA and are therefore displaced. Both Dow and Met pleaded ERISA preemption in their answers; Maddolin did not.

"RELATE TO"

A state law, defined in section 1144(c)(1) to include all laws, decisions, rules, regulations, or other action having the effect of law, is preempted by ERISA only if it "relates to" a plan. 29 U.S.C. § 1144(a) (1988). We must therefore begin with the fundamental inquiry: When does a state law relate to an employee benefit plan?

The United States Supreme Court has loosely defined the parameters of the "relate to" requirement. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection or reference to such a plan." *Shaw*, 463 U.S. at 96-97. Also the Court declared that "[t]he phrase 'relate to' was given its broad commonsense meaning." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). The Court has

repeatedly stated that the words "relate to" should be construed expansively. *See Shaw,* 463 U.S. at 96-97; *Pilot Life,* 481 U.S. at 46-48; *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 8 (1987). ERISA preemption applies not only to state laws but to all forms of state action dealing with the subject matters covered by this federal statute. 29 U.S.C. § 1144(c)(1) (1988); *see also Shaw,* 463 U.S. at 98. In keeping with this broad interpretation, the Court held that a cause of action for wrongful termination related to an ERISA plan where it was based on the allegation that the employer fired the employee to avoid paying benefits under a pension plan. *Ingersoll-Rand Co. v. McClendon,* 111 S. Ct. 478 (1990).[2]

Given these declarations by the Supreme Court, courts have not hesitated to find that state laws having an effect on employee benefit plans relate to such plans and are therefore preempted by ERISA. *See, e.g., Ramirez v. Inter-Continental Hotels,* 890 F.2d 760 (5th Cir. 1989); *Boren v. N.L. Indus.,* 889 F.2d 1463 (5th Cir. 1989), *cert. denied.*, 110 S. Ct. 3283, 111 L. Ed. 2d 792 (1990); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters.*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, *cert. denied* 109 S. Ct. 3216, 106 L. Ed. 2d 566 (1989); *Misic v. Building Serv. Employees Health & Welfare Trust,* 789 F.2d 1374 (9th Cir. 1986); *Juckett v. Beecham Home Improvement Prods., Inc.*, 684 F. Supp. 448 (N.D. Tex. 1988); *E-Systems, Inc. v. Taylor,* 744 S.W.2d 956 (Tex. App.—Dallas 1988, writ denied); *Giles v. Texas Instruments Employees Pension Plan,* 715 S.W.2d

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[2] Also, we note that the Supreme Court handed down *FMC Corporation v. Holliday* contemporaneously with *McClendon.* 111 S. Ct. 403 (1990). However, that opinion does not impact our decision in this case. In *Holliday,* the Court considered whether a state law prohibiting subrogation claims fell within ERISA's insurance saving clause. The state law did not conflict with ERISA's exclusive remedy scheme.

58 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Felts v. Graphic Arts Employee Benefits Trust*, 680 S.W.2d 891 (Tex. App.—Houston [1st Dist.] 1984, no writ). "Because of the breadth of the preemption clause and the broad remedial purpose of ERISA, 'state laws found to be beyond the scope of [the preemption provision] are few.' " *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989).

The common law claim in *Pilot Life* was not alleged against the employee benefit plan, but against the insurance company that administered the plan. Nevertheless, the Court noted that the cause of action clearly related to a plan and was thus preempted. 481 U.S. at 47-48; *see also Ramirez*, 890 F.2d at 760, 762-63 (suit brought against former employer and its insurance carrier held to be preempted); *Cefalu*, 871 F.2d at 1292-93 (suit related to an ERISA plan even though it was alleged against the former employer and not the plan). The Catheys' claim for nursing care was made and denied pursuant to the Dow plan's terms, and they appealed this denial under the internal review provisions of the plan. We hold that the Catheys' claims against Dow and Met relate to an employee benefit plan; the claims are thus preempted unless a contrary result is mandated by the saving clause.

ERISA'S EXCLUSIVE REMEDY SCHEME v. THE SAVING CLAUSE

The Catheys assert that even if their claims relate to an employee benefit plan, they are saved from preemption by section 1144(b)(2)(A), the saving clause. The saving clause saves from preemption state laws which regulate insurance. *Metropolitan Life*, 471 U.S. at 737; *Pilot Life*, 481 U.S. at 47. However, even the saving clause cannot save from preemption a state law that provides remedies not provided by ERISA. In *Pilot Life*, the Supreme Court announced that ERISA's civil enforcement remedies were

intended to be exclusive. 481 U.S. at 54. *Pilot Life* involved allegations of improper processing of a claim for benefits. In holding that the plaintiff's claim for breach of the Mississippi common-law duty of good faith and fair dealing was preempted by ERISA, the Court stated, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.; see also McClendon*, 111 S.Ct. at 484-85; *Mutual Life Ins. Co. v. Yampol*, 840 F.2d 421, 425 (7th Cir. 1988).

Even if these insurance code provisions and the DTPA provisions were subject to the saving clause, the Court's opinions in *Pilot Life* and *McClendon* held that Congress intended all suits alleging improper claims processing be governed only by ERISA. *McClendon*, 111 S.Ct. at 485; *Pilot Life*, 481 U.S. 52-54. Section 16 of article 21.21 and article 3.62 of the Insurance Code and section 17.50(a)(4) of the DTPA provide recovery that was not included under ERISA. The Court has decided that ERISA's civil enforcement scheme could not be supplemented by state law remedies. Therefore, a statutory remedy for improper claims processing is not available against an ERISA plan or its administrator.

CONCLUSION

The Catheys seek to recover remedies not available under ERISA's civil enforcement provisions. Therefore, even if the provisions in question could be said to regulate the business of insurance for purposes of ERISA preemption analysis, they would still be preempted as laws that provide remedies that are inconsistent with the civil enforcement provisions provided in ERISA. *See Pilot Life*, 481 U.S. 51-57; *Massachusetts Mutual Life Ins. Co. v.*

Russell, 473 U.S. 134, 146 (1985); *Ramirez*, 890 F.2d at 764; *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 456 n.2 (10th Cir. 1989); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493-94 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3216, 106 L. Ed. 2d 566 (1989); *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194 (8th Cir. 1988); *Anschultz v. Connecticut Gen. Life Ins. Co.*, 850 F.2d 1467, 1469 (11th Cir. 1988); *Juckett v. Beecham Home Improvement Prods.*, 684 F. Supp. 448 (N.D. Tex. 1988); *McManus v. Travelers Health Network*, 742 F. Supp. 377 (W.D. Tex. 1990); *Commercial Life Ins. Co. v. Superior Court*, 764 P.2d 1059 (Cal. 1988), *cert. denied sub nom, Juliano v. Commercial Life Ins. Co.*, 109 S. Ct. 2087, 104 L. Ed. 2d 651 (1989). Accordingly, we hold that Texas Insurance Code section 16 of article 21.21 and article 3.62 as well as DTPA section 17.50(a)(4) are preempted by the provisions of ERISA in the context of the facts of this case. Dow and Met properly pleaded ERISA preemption in their answers; Maddolin did not. We agree with the court of appeals, however, that the preemption of the Catheys' claims against Dow and Met extends to Maddolin because he acted as Met's employee in the course of its business. We therefore affirm the judgment of the court of appeals.

RAUL A. GONZALEZ
Justice

OPINION DELIVERED: January 30, 1991

Concurring opinion by Justice Doggett joined by Justices Mauzy, and Gammage.

APPENDIX B

IN THE SUPREME COURT OF TEXAS

NO. C-8323

JAMES C. CATHEY	§	
BETTE CATHEY,	§	
Petitioners,	§	
	§	FROM HARRIS
v.	§	COUNTY
	§	
	§	FIRST DISTRICT
METROPOLITAN LIFE	§	
INSURANCE CO., DOW	§	
CHEMICAL CO. and	§	
MICHAEL H. MADDOLIN,	§	
Respondents.	§	

CONCURRING OPINION

In one brief writing the court today is forced to eliminate the rights of hundreds of thousands of Texas families to protect themselves from false, misleading, and deceptive practices in the handling of health and disability insurance claims. These are rights that had been secured by consumer protection statutes properly enacted by the Texas Legislature and that remain in effect today for those Texans who obtain their coverage directly from insurers rather than through their employers. Unfortunately, there is little that I or any other member of this court can do about this deplorable demise of state-given rights other than to lament their passage.

Recognizing that *Ingersoll-Rand v. McClendon,*

— U.S. —, 111 S. Ct. 478 (1990), and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), control this case, I must concur with the court's opinion. By its reading of ERISA's preemption clause, the United States Supreme Court has restricted the very rights of employees—to avoid the delay or denial of benefits—that Congress sought to protect. Through peculiar federal judicial interpretation, a statutory addition to workers' rights has been converted into a statutory removal of those rights. The law has been reshaped into a form that achieves the converse of its original purpose. Identical claims are now treated differently depending on whether the claimant is insured individually or through an employer. Those insured through their employers are denied by ERISA preemption the safeguards afforded by Texas to their fellow citizens. I join with the growing number of courts and commentators who express the concern that through continued misconstruction, ERISA has become "quicksand" that "will continue to expand and to preempt everything in its meandering path." *Jordan v. Reliable Ins. Co.*, 694 F. Supp. 822, 835 (N.D. Ala. 1988). For the over 56 million Americans who are enrolled in group health insurance plans like the one in which James Cathey was a member,[1] ERISA has become more than mere quicksand; it has become a black hole.

Through ERISA, Congress sought "to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire." H. Rep. No. 807, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4670. The measure responded to increasing abuses against workers caused by irresponsible management of pension and welfare benefit funds. In its "declaration of policy," Congress noted:

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[1] U. S. Census Bureau, 1990 Statistical Abstract 413 (1990).

> that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits.

29 U.S.C. § 1001(a) (1974). The primary objective of the legislation was "to increase the rights of employees by imposing strict fiduciary duties on employers and benefit plan administrators and by providing the employees with the civil remedies in section 502(a)." Note, *Punitive Damages and ERISA: An Anomalous Effect of ERISA's Preemption of Common Law Actions,* 65 Wash. U.L.Q. 589, 609 (1987).

In view of this laudable goal, several commentators have expressed dismay at the paradox that has arisen since *Pilot Life:* the workers ERISA was intended to protect lack a remedy for wrongs unaddressed by the statute, while the companies targeted by Congress employ ERISA as an effective shield against responsibility for wrongful processing of claims. The first manifestation of this incongruous result is that workers covered by group benefit plans have been denied state causes of action that had been available prior to the Act's passage. *Id. See also,* Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After Pilot Life Insurance Co. v. Dedeaux,* 21 Loy. L.A.L. Rev. 1343, 1381 n.303 (1988) (hereinafter Note, *Blind Faith*) (observing the lack of Congressional intent to preempt state causes of action for breach of a covenant of good faith and fair dealing). Second, persons covered by group benefit

plans are limited to ERISA's remedies, while individual insurance policyholders retain the full range of state remedies. *Id.* at 1347.[2] The harm is exacerbated by the reality that employees seldom have a voice in selecting their company's group insurer. Whether taken separately or together, these developments evince a disturbing disregard for Congress' overriding intent to protect the participants and beneficiaries of group benefit and pension plans. Their aim is best served by reading ERISA's remedies as a floor rather than a ceiling, and by respecting the traditional deference given to state insurance regulations as mandated by the McCarran-Ferguson Act, 15 U.S.C. § 1011. Under ERISA, insurers who provide group benefit plans have little incentive to deal promptly and fairly with employee participants.[3] Indeed, for ERISA to

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[2]The Supreme Court reinforced a third curious distinction—that between self-insured plans and those that obtain insurance from regulated insurance companies—in *FMC Corp. V. Holliday*, — U.S. —, 111 S.Ct. 403 (1990), discussed in the majority opinion, *supra*, — S.W.2d at — n.1. This distinction was introduced by the Court in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). In his dissent to *Holliday*, Justice Stevens describes the distinction as "broad and illogical," and adds:

> Had Congress intended this result, it could have stated simply that 'all State laws are pre-empted insofar as they relate to any self-insured employee plan.' There would then have been no need for the 'saving clause' to exempt state insurance laws from the pre-emption clause, or the 'deemer clause,' which the Court today reads as merely reinjecting into the scope of ERISA's pre-emption clause those same exempted state laws insofar as they relate to self-insured plans.

Holliday, — U.S. at —, 111 S. Ct. at 411 (Stevens, J., dissenting).

[3] Under 29 U.S.C. § 1132, ERISA plan participants or beneficiaries harmed by a lengthy delay in, or unreasonable denial of, benefits may bring a time-consuming and expensive action in court to recover no more than the benefits due under the plan. § 1132(a)(1)(B). The award of attorney's fees is possible, but solely within the discretion of the court. § 1132(g)(1).

preempt all state law that may be loosely defined as "relating to" employee benefit plans is "counterproductive to ERISA's objective of furthering, rather than debilitating, progressive employment law." Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism,* 48 U. Pitt. L. Rev. 427, 457 (1987).

Moreover, expansive preemption of state common law and statutes regulating the insurance industry upsets the equilibrium between the federal government and the states that Congress intended to preserve by enacting the saving clause, 29 U.S.C. §1144(b)(2)(A), thereby eviscerating this once-important provision. In *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985), the clause was initially given vitality by acknowledgment of the well-established rule that "[t]he presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope." *Id.* at 741. The presumption against preemption is particularly strong with respect to those areas, such as insurance, "traditionally regarded as properly within the scope of state superintendence." *Florida Lime and Avocado Growers v. Paul,* 373 U.S. 132, 144 (1963); *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977).

In *Metropolitan Life,* while state-mandated policy inclusion of mental health coverage was related to the business of insurance and therefore within the scope of preemption, the saving clause directed that the law not be preempted. 471 U.S. at 739, 746-47. In so holding, the Court analyzed the legislative history of ERISA, and noted that the final version of the law included a preemption clause more broadly worded than those in the original versions submitted to the Conference Committee by the two houses of Congress. Rather than halting its analysis at that point, as it did in *Pilot Life,* 481 U.S. at 46, the Court pro-

ceeded to conclude that this expansion of the preemption clause "gave the insurance clause a much more significant role, *as a provision that saved an entire body of law from the sweeping general pre-emption clause.*" *Metropolitan Life,* 471 U.S. at 745 n.23 (emphasis added). The Court's holding thus refused to "impose any limitation on the saving clause beyong those Congress imposed in the clause itself." *Id.* at 746.

In contrast to the *Metropolitan Life* Court's careful deference to Congress' intent to balance the preemption and saving clauses, the *Pilot Life* opinion added a consideration that tips the balance of federalism inexorably away from the states by reducing the saving clause analysis to an empty exercise. The Court interpreted ERISA's legislative history to support the notion that Congress had intended that the statute's remedies be exclusive. This holding was drawn from the statements of several members of Congress to the effect that ERISA was meant to "preempt the field." 481 U.S. at 46. Congress' intent that ERISA provide exclusive remedies, however, was subordinate to its effort to provide greater protections to workers covered by pension and welfare benefit plans. When viewed in the light, the preemption clause should be given no more than equal consideration with the saving clause, which remains to preserve state regulation of insurance that is equally meant to safeguard the interests of workers.[4] Instead, as one commentator asserts, "the *Pilot Life* Court gutted the saving clause of meaning." Note, *Blind Faith, supra,* at 1382.

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[4] The Court correctly observed in *Metropolitan Life:* "While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time." 471 U.S. at 740. It seems that where ERISA is concerned, the Court has created an exception to this principle.

Refusing an interpretation of *Pilot Life* that would require the preemption of a California statute regulating the bad faith conduct of insurers, one court appropriately concluded that to do so "would rewrite the saving clause to read: 'Nothing in this subchapter *except section 1132* shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . .' The Supreme Court strongly indicated in *Metropolitan Life* that this is not the law." *Graves v. Blue Cross*, 688 F. Supp. 1405, 1412 (N.D. Cal. 1988) (emphasis in original). Unfortunately, this interpretation has now been rejected by *McClendon*. *Pilot Life* and *McClendon* thus seize from the states the ability to "deter[ ] insurance companies from exploiting insureds when they are most financially vulnerable." Note, *Blind Faith*, *supra*, at 1397.

By affirming *Pilot Life's* unfortunate mischaracterization of Congressional intent, the Supreme Court in *McClendon* takes another step away from the goals of federalism. States are no longer the laboratories of democracy[5] when it comes to protecting their consumers. States have been thwarted in their efforts to fill the federal void left in the regulation of insurance companies that provide benefit plans under ERISA. Gregory, *supra*, at 457. Ironically, this gap was initially created by the Congress in the McCarran-Ferguson Act, 15 U.S.C. § 1011, which entrusts to the States the regulation of "the business of insurance."

This federal court deprivation of state law protections stands in notable juxtaposition with the professed goal of some in Washington to return power to the states. The Texas courts and the Texas legislature are powerless

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[5] *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

to preserve the rights of workers covered by group benefit plans. Texans have little recourse but to petition their federal legislators to correct what has been an errant jurisprudential path. The time is long past for Congress to reconsider the expanse of ERISA and to resurrect the authority of the states to provide additional protections to their citizens.

LLOYD DOGGETT
Justice

Justices Mauzy and Gammage join in this concurring opinion.

OPINION DELIVERED: January 30, 1991

APPENDIX C

THE SUPREME COURT OF TEXAS

NO. C-8323

JAMES C. CATHEY and BETTE CATHEY Petitioners	§	FROM HARRIS COUNTY
v.	§	FIRST DISTRICT
METROPOLITAN LIFE INSURANCE CO., DOW CHEMICAL CO. and MICHAEL H. MADDOLIN Respondents	§	

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the First District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be affirmed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals, which affirmed the summary judgment rendered by the trial court for Metropolitan, Dow and Maddolin, is affirmed;

2) Metropolitan Life Insurance Co., Dow Chemical Co. and Michael H. Maddolin shall recover from James C. Cathey and Bette Cathey, who shall pay, the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Harris County, Texas, for observance.

(Opinion of the Court delivered by Justice Gonzalez)
(Concurring Opinion by Justice Doggett joined by Justice Mauzy and Justice Gammage)

January 30, 1991

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APPENDIX D

James C. CATHEY and Bette Cathey, Appellants,

METROPOLITAN LIFE INSURANCE CO., the Dow Chemical Co., and Michael H. Maddolin, Appellees.

No. 01-88-00046-CV.

Court of Appeals of Texas, Houston (1st Dist.).

Dec. 22, 1988.

Rehearing Denied Jan. 18, 1989.

Employee and his wife brought action against employer, insurer, and insurer's employee for wrongful denial of his claim for nursing home services for care of the wife. The 113th District Court, Harris County, Geraldine B. Tennant, J., entered summary judgment in favor of defendants and employee and his wife appealed. The Court of Appeals, Sam Bass, J., held that: (1) employer's insurance program was an ERISA plan; (2) common-law claims based on breach of contract, negligence, and breach of duty of fair dealing were preempted by ERISA; (3) claims under the Deceptive Trade Practices Act and the Insurance Code were preempted; (4) statutes under which plaintiffs sued were not statutes regulating insurance; and (5) preemptive effective ERISA applied to employee of plan administrator.

Affirmed.

James W. Patterson, Patterson & Patterson, Joe K. Longley, Mark L. Kincaid, Longley & Maxwell, Houston, for appellants.

A.J. Harper, II, Katherine D. Hunt, Fulbright & Jaworski, Houston, Ace Pickens, Thomas W. Bullion III, Brown, Maroney, Rose, Barber & Dye, Austin, Alvin Pasternak, Donald J. Harman, James Lenaghan, William Toppeta, New York City, for Metropolitan Life Ins. Co.

Before WARREN, STEPHANOW and SAM BASS, JJ

OPINION

SAM BASS, Justice.

James and Bette Cathey appeal from a summary judgment in favor of Metropolitan Life Insurance Co. (Met), Dow Chemical Co. (Dow), and Michael H. Maddolin. The appellants alleged multiple common law and statutory causes of action for: (1) breach of contract under Tex.Ins.Code Ann. art. 3.62 (Vernon 1981); (2) unfair insurance practices in violation of Tex.Ins. Code Ann. art. 21.21, sec. 16 (Vernon 1981); (3) deceptive trade practices, unfair insurance practices, and unconscionable conduct in violation of Tex.Bus. & Com.Code Ann. secs. 17.46(b), and 17.50(a)(1)-(a)(4) (Vernon 1987); as well as (4) breach of the duty of good faith and fair dealing, negligence, and gross negligence. Appellants did not assert any causes of action under the Federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144 (1985).

The trial court found each cause of action was preempted by ERISA. Appellants were offered the opportunity to amend their petition to assert a cause of action under

ERISA but expressly refused to do so. The court then dismissed the suit.

We affirm.

Appellants seek recovery for wrongful denial of appellant's claim for in-home nursing services by the Dow Company Medical Care Program ("Dow Plan" or "Plan"). Because this is a summary judgment case, the facts shown by the Catheys must be taken as true. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985). James Cathey was employed as a purchasing agent for Dow. During Cathey's employment, he was told by Dow representatives that he and his wife were covered by a group insurance plan. In the mid-1970's, Mrs. Cathey acquired multiple sclerosis, and eventually reached a point of disability where she could not walk without assistance. In 1982, Cathey's doctors ordered nursing care for her. These expenses were paid for under the group insurance plan carried by Met covering Dow employees. In 1985, appellee Met, acting as the claims administrator for the Dow Plan, denied certain claims for nursing care expenses under certain provisions of the Plan. Maddolin, a claims consultant for Met, evaluated the claims during his employment with Met. Dow, the Plan administrator, upheld the denial of the claims.

[1] ERISA is a pervasive regulatory scheme for "employee benefit plans." The scope of ERISA's preemption of state law is delineated in three sections of the statute. The "pre-emption clause" of ERISA, 29 U.S.C. § 1144(a), provides that ERISA supercedes all state laws insofar as they "relate to any employee benefit plan;" however, ERISA's "savings clause," 29 U.S.C. §1144 (b)(2)(A), excerpts from the preemption clause any state law that "regulates insurance." ERISA's deemer clause,"

29 U.S.C.§ 1144(b)(2)(B), provides that no employee benefit plan shall be deemed to be an insurance company for purposes of any state law "purporting to regulate insurance." In sum, a state law is pre-empted if it "relate[s] to" an employee benefit plan unless it is a state law that "regulates insurance." However, a state cannot "deem" an employee benefit plan to be an insurer in order to regulate the plan under state laws regulating insurance companies.

[2-4] Appellants argue that the pre-emption provision of ERISA is not applicable because none of the defendants are an "employee benefit plan" and hence, appellants' claims do not "relate to" a "plan." We do not agree. There are three general types of "plans" regulated by ERISA: (1) an employee welfare benefit plan; (2) employee pension benefit plans; and (3) plans that are both an employee welfare benefit plan and an employee pension plan. An "employee welfare benefit plan" provides medical and other benefits in the event of sickness, accident, disability, death or unemployment. An "employee pension benefit plan" provides retirement or deferred income to employees. 29 U.S.C. § 1002(1), (2)(A), (3). The Dow Plan is an ERISA plan. ERISA applies to any employee benefit plan, fund, or program, established or maintained by any employer, to the extent such plan is "maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability. . . ." 29 U.S. C. § 1002(1). The Dow Plan is an employee welfare benefit plan since it provides medical benefits and is established and maintained by Dow, an employer engaged in commerce. 29 U.S.C. § 1003(a). Pursuant to the ERISA requirements, Dow is the designated Plan Administrator and a named fiduciary for the Plan. *See* 29 U.S.C. §§ 1002(16)(a) and 1102(a). Dow, as Plan Sponsor, has designated Met as the Plan's claims

administrator pursuant to 29 U.S.C. § 1133(2) and the regulations issued thereunder.

[5] The phrase "relate to" was given its broad common-sense meaning in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), such that a state law "relate[s] to" a benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* The appellants' complaint alleges several state common law causes of action: breach of contract, negligence, gross negligence, and breach of the duty of good faith and fair dealing. Appellant asserts statutory causes of action of unfair insurance and deceptive trade practices under the Texas Insurance Code and the Texas Business & Commerce Code. The causes of action asserted in the appellants' complaint, each based on an alleged improper denial of a claim under an employee benefit plan, "relate to" an employee benefit plan and therefore, fall under ERISA's express pre-emption clause. *See Pilot Life Ins. Co. V. Dedeaux*, 481 U.S. 107 S.Ct. 1549, 1553, 95 L.Ed.2d 39 (1987). Unless these causes of action fall under an exception in section 1144(b)(2)(A) or (B), they are expressly pre-empted.

It is well-settled that ERISA preempts state common law causes of action relating to an employee benefit plan in favor of the development of federal common law. *See Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). The Supreme Court gave two reasons for rejecting the argument that the state common law of bad faith was a law regulating insurance. First, "in order to regulate insurance, a law must not just have an impact on the insurance industry, but be specifically directed toward that industry." *Id.* 107 S.Ct. at 1554. The court found that even though bad faith law is often applied to the

insurance industry, "the roots of this law are firmly planted in the general principles of [state] tort and contract law." *Id.* The law applies to any breach of contract, not just breach of an insurance contract. Second, the [state] bad faith law fails to meet the indicia of laws that relate to "the business of insurance" developed under the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1984). Three criteria have been used to determine whether a practice falls under the "business of insurance" for purposes of the McCarran-Ferguson Act:

> First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982) (emphasis omitted).

[6] The Cathey's complaint, with respect to its common law claims, fails for the same reasons. Their common law claims are not based on laws "specifically directed toward [the insurance] industry." The laws of negligence and breach of contract are applicabale to any tort or contract causes of action, not only those directed toward the insurance industry. For the reasons given above, we conclude that appellants' common law claims are not based on laws regulating insurance and, therefore, are pre-empted by ERISA.

This case also presents the question of whether ERISA preempts a claim for damages under the Tex.Ins.Code Ann. art. 3.62, art. 21.21, and the Tex.Bus. & Com.Code Ann. sec. 17.50(a)(4) (DTPA). *Gorman v. Life Ins. Co. of North America*, 752 S.W.2d 710 (Tex.App.—

Houston [1st Dist.] 1988, writ requested), is a case similar to the one at issue. The Apellants filed suit against both Tenneco and LINA, pleading common law causes of action for:(1) breach of contract, (2) common law fraud, (3) breach of fiduciary duty, (4) breach of duty of good faith and fair dealing, and (5) negligence. Appellants also pled statutory causes of action for violations under Tex.Ins.Code Ann. art. 21.21 (Vernon Supp. 1988) and Deceptive Trade Practices under the Tex.Bus.& Comm.Code Ann. secs. 18.46-17.62 (Vernon Supp. 1988). The court recited that the jury found Tenneco misrepresented material facts, breached its fiduciary duty, and breached its duty of good faith and fair dealing. *See Gorman*, 752 S.W.2d at 712. From these findings, however, it is not clear that the jury found a violation of any of the statutes specifically regulating insurance, and the court did not discuss whether the causes of action under the Tex.Ins.Code and the DTPA might be saved by 29 U.S.C. § 1144(b)(2)(A).

[7,8] The Texas Legislature has declared that the purpose of art. 21.21 is "to regulate trade practices in the business of insurance." Tex.Ins.Code Ann. art. 21.21(1). Thus, art. 21.21 does not "just have an impact on the insurance industry," it is "specifically directed toward that industry." *Pilot Life*, 107 S.Ct. at 1554. Article 21.21 satisfies the U.S. Supreme Court's common-sense test for a law that "regulates insurance." *Id.* Article 21.21 also comes within the definition of a law relating to the "business of insurance" under the McCarran-Ferguson Act. *Union Labor*, 458 U.S. at 129, 102 S.Ct. at 3008. Article 21.21 regulates the terms of certain insurance contracts, and so seems to be saved from pre-emption by the savings clause as a law "which regulates insurance." Nonetheless, the language of the subsequent section of ERISA, the "deemer clause," states that an employee benefit plan shall *not* be deemed to be an insurance company "for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks,

trust companies, or investment companies." 29 U.S.C. § 1144(b)(2)(B). While a bona fide insurance company may not cease to be engaged in the business of insurance when it sells a policy to an employee benefit plan for the benefit of plan participants, *Goodrich v. General Tel. Co.*, 241 Cal. Rptr. 640, 195 Cal.App.3d 675, *review granted*, 242 Cal.Rptr. 732, 746 P.2d 871 (1987), Congress clearly did not intend employee benefit plans to be regulated under state insurance regulation laws. The deemer clause makes explicit Congress' intention to exempt from the savings clause laws regulating insurance that apply directly to benefit plans. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740-41, 105 S.Ct. 2380, 2389-90, 85 L.Ed.2d 728 (1985). We hold that appellants' cause of action under art. 21.21 of the Texas Insurance Code is not protected under the "savings clause," and is therefore pre-empted by ERISA.

[9] Article 3.62 is a penalty provision of the Texas Insurance Code providing remedies for a breach of an insurance contract. Article 3.62 of the Insurance Code is titled "Penalty for Delay in Payment of Losses" and provides:

> In all cases where a loss occurs and the life insurance company, or accident insurance company . . . liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve (12%) per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss.

Tex.Ins.Code Ann. art. 3.62.

While art. 3.62 may be specifically directed toward the insurance industry, it cannot be said to regulate the

substantive terms of insurance contracts; it is therefore pre-empted by ERISA. *See Metropolitan Life* at 742-43, 105 S.Ct. at 2390-91. In *Juckett v. Beecham Home Improvement Prod. Inc.*, 684 F.Supp. 448 (N.D.Tex. 1988), an ERISA plan participant sued for medical expense benefits that had been denied by the claims administrator for the plan. The acting chief judge held that, based on *Pilot Life* and *Metropolitan Life*, the statutory cause of action was pre-empted by ERISA.

[10] Furthermore, the Texas Deceptive Trade Practices Act is not a law specifically designed to "regulate insurance," and therefore, causes of action under this provision are not saved from pre-emption. *See Sams v. N.L. Indus. Inc.*, 735 S.W.2d 486 (Tex.App.—Houston [1st Dist.] 1987, no writ); *Giles v. TI Employees Pension Plan*, 715 S.W.2d 58 (Tex.App.—Dallas 1986, no writ); *Felts v. Graphic Arts Employee Benefit Trust*, 680 S.W.2d 891 (Tex.App.—Houston [1st Dist.] 1984, no writ).

(11) Appellants further argue that because the ERISA plan, in this case, is insured, it is subject to indirect regulation under state law citing, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728 (1987). *Metropolitan Life Ins. Co. v. Taylor*, as well as *Gorman*, all involved plans that were *fully insured*. Each decision held that the plaintiffs could not pursue remedies under state law, but were limited to pursuing remedies under ERISA.

[12,13] Appellants assert that appellees are barred from relying on the ERISA pre-emption as a defense since it was not affirmatively pled. Both Dow and Met pled ERISA pre-emption in their answers. Dow stated that "ERISA preempts all state law claims" in its first amended answer to the appellants' third amended petition. Met,

in its first amended answer, stated that all "state law claims of the Plaintiffs predicated upon The Dow Medical Care Program, are pre-empted by Federal Law pursuant to the terms and provisions of the Employee Retirement Income Security Act ('ERISA')." Even if appellees had not raised ERISA pre-emption in their answers they would be permitted to do so in a motion for summary judgment. This court decided in *Gorman* that the appellees could raise ERISA pre-emption despite "their failure to raise it as an affirmative defense." *Gorman*, 752 S.W.2d at 713. The court noted that "[a] claim of federal pre-emption is a challenge to the court's subject matter jurisdiction and cannot be waived." *Id. see also International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986); *Barry v. Dymo Graphic Sys., Inc.*, 394 Mass. 830, 478 N.E.2d 707 (1985).

[14,15] Appellants' final argument, under its first point of error, concerns the sufficiency of the affidavit of Bollinger as to the funding of the Dow employee benefit plan. Appellants assert that appellees' summary judgment proof was inadequate because the statements in the affidavit were inadmissible because they were conclusory and not founded on personal knowledge. Tex.R.Civ.P. 166a(e) states that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Brownlee v. Brownlee*, 665 S.W.2d 111,112 (Tex.1984); Tex.R.Civ.P. 166a(e). Bollinger, the Director of the U.S. Area Benefits Department of Dow, stated that he was speaking from "personal knowledge." The affidavit expressly states that "Dow has at all times material to this suit reimbursed Met for all monies advanced plus an expense charge thereon." The affidavit is sufficient summary judgment evidence. *See, e.g., Marek v. Tomoco Equip. Co.*,

738 S.W.2d 710, 714 (Tex.App.—Houston [14th Dist.] 1987, no writ) (in the absence of "any evidence to the contrary. . . .," a statement that the affiant "has personal knowledge of every statement contained in the affidavit . . .is sufficient to satisfy the requirements of Rule 166-A(e)); *Larcon Petroleum, Inc. v. Autotronic Sys. Inc.*, 576 S.W.2d 873 (Tex.Civ.App.—Houston [14th Dist.] 1979, no writ) (affidavit that stated it was made on personal knowledge complied with Rule 166(a)(e)"). A court will not speculate whether the affiant could establish the facts contained in the affidavit if testifying from the witness stand. *A & S Elec. Contractors, Inc. v. Fischer*, 622 S.W. 2d 601, 603 (Tex.Civ.App.—Tyler 1981, no writ). The affidavit will be taken at face value. *Netherland v. Wittner*, 624 S.W.2d 685, 687-88 (Tex.App.—Houston [14th Dist.] 1981, no writ). The decision cited by appellants, *Mercer v. Daoran Corp.*, 676 S.W.2d 580 (Tex.1984), does not support their contention because that case turned on the application of the best evidence rule, which is inapplicable to the affidavit at hand.

We hold that the appellants' state common law and statutory causes of action are pre-empted by 29 U.S.C. § 1144(a), and that the trial court did not err in entering summary judgment on pre-emption grounds.

Appellants' first point of error is overruled.

Appellants assert, in their second point of error, that the trial court erred in granting summary judgment in favor of Maddolin. Appellee Maddolin reviewed appellants' claims in connection with his role as a consultant and employee of appellee Met. Any actions performed by Maddolin were in the course and scope of his employment for Met.

[16] For the reasons stated above, plaintiffs cannot

pursue their lawsuit against either Met or Dow. Any claim that they might have against Maddolin is dependent on the viability of their claim against his employer, Met. Since ERISA's pre-emptive effect applies to lawsuits asserted against a claims administrator, such as Met, it also applies to lawsuits against employees or agents of the claims administrator, such as Maddolin. *See, e.g., Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 (11th Cir.1987) (reach of ERISA pre-emption extends not only to the claims against CIGNA, but to claims against the insurance broker as well); *McMahon v. McDowell*, 794 F.2d 100 (3d Cir. 1986), *cert. denied*, 479 U.S. 971, 107 S.Ct. 473, 93 L.Ed.2d 417 (1987) (summary judgment in favor of corporate employer and its individual officers and directors held proper since ERISA preempts plaintiff's common law and statutory claims). Appellants herein assert state law claims against Dow, Met, and its employee Maddolin for Dow benefits. The substance of appellants' state law claims against all appellees, including Maddolin, is the same. These state law claims relate to the Dow Plan, an employee benefit plan. They are, therefore, pre-empted by ERISA, whether they are asserted against Met, against Dow, or against Maddolin. The trial court correctly granted summary judgment in favor of Maddolin.

Appellants' second point of error is overruled.

The judgment is affirmed.

NO. 85-43159

Received Oct 15 1987

JAMES C. CATHEY ET UX, Plaintiffs,	§	IN THE DISTRICT COURT FOR
V.	§	HARRIS COUNTY, TEXAS
METROPOLITAN LIFE INSURANCE CO., DOW CHEMICAL CO. ET AL Defendants.	§	113TH JUDICIAL DISTRICT

ORDER GRANTING SUMMARY JUDGMENT

The court considered the motions of the defendants, Dow Chemical Company, Metropolitan Life Insurance Company and Michael H. Maddolin for summary judgment and the court decided to grant the motions.

It is, therefore, ordered that the motions for summary judgment of Dow Chemical Company, Metropolitan Life Insurance Company and Michael H. Maddolin are granted.

It is further ordered that the Plaintiffs were allowed the option of amending their petition within thirty days after the date this order is signed to assert their exclusive ERISA claim. The Plaintiffs have informed the court that they refuse to amend. Thus, this suit is hereby dismissed with predjudice to refile.

Signed 13 October, 1987.

/s/ Geraldine Tennant

Geraldine Tennant
Judge Presiding

APPENDIX F

STATUTES INVOLVED

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)

§ 1132. Civil enforcement.

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

* * *

(2)(A) Except as provided in subparagraph (B),

nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

* * *

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX G

McCARRAN-FERGUSON ACT

CHAPTER 20 - REGULATION OF INSURANCE

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX H

TEXAS INSURANCE CODE

ART. 21.21. Unfair Competition and Unfair Practices

Declaration of purpose

Sec. 1. (a) The purpose of this Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress),[1] by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

(b) This Article shall be liberally construed and applied to promote its underlying purposes as set forth in this section.

* * *

Relief available to injured parties

Sec. 16. (a) Any person who has sustained actual damages as a result of another's engaging in an act or practice declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the person or persons engaging in such acts or practices.

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[1] 15 U.S.C.A. §§ 1011 to 1015.

(b) In a suit filed under this section, any plaintiff who prevails may obtain:

(1) the amount of actual damages plus court costs and reasonable and necessary attorneys' fees. If the trier of fact finds that the defendant knowingly committed the acts complained of, the court shall award, in addition, two times the amount of actual damages; or

(2) an order enjoining such acts or failure to act; or

(3) any other relief which the court deems proper.

APPENDIX I

Texas Deceptive Trade Practices —Consumer Protection Act

Ch. 17, Texas Business & Commerce Code

§ 17.50. Relief for Consumers

(a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter;

(2) breach of an express or implied warranty;

(3) any unconscionable action or course of action by any person; or

(4) The use or employment by any person of an act or practice in violation of Article 21.21, Texas Insurance Code, as amended, or rules or regulations issued by the State Board of Insurance under Article 21.21, Texas Insurance Code, as amended.

APPENDIX J

TEXAS STATE BOARD OF INSURANCE — RULES AND REGULATIONS

28 Texas Administrative Code

§ 21.1 Deceptive Acts or Practices of Insurers, Agents, and Connected Persons

Purpose of Regulation. It is the purpose of these sections to further define and state the standards that are necessary to prohibit deceptive acts or deceptive practices by insurers and insurance agents and other persons in their conduct of the business of insurance or in connection therewith, whether done directly or indirectly, and irrespective of whether the person is acting as insurer, principal, agent, employer, or employee, or in other capacity or connection with such insurer.

* * *

§ 21.2. Unfair Trade Practices Prohibited

(a) Misrepresentation of insurance policies, unfair competition, and unfair practices by insurers, agents, and other connected persons are prohibited by Article 21.20 and Article 21.21 or by other provisions of the Insurance Code and by these sections of the State Board of Insurance. No person shall engage in this state in any trade practice that is a misrepresentation of an insurance policy, that is an unfair method of competition, or that is an unfair or deceptive act or practice as defined by the provisions of the Insurance Code or as defined by these sections and other rules and regulations of the State Board of Insurance authorized by the Code.

(b) Irrespective of the fact that the improper trade practice is not defined in any other section of these rules and regulations, no person shall engage in this state in any trade practice which is determined pursuant by law to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

§ 21.4. Misrepresentation Defined; Standards for Determining Misrepresentation

The term misrepresentation, or the prohibited conduct, act, or practice that constitutes misrepresentation by a person subject to the provisions of these sections, is defined as any one of the following acts or omissions:

(1) any untrue statement of a material fact; or

(2) any omission to state a material fact necessary to make the statements made (considered in the light of the circumstances under which they are made) not misleading; or

(3) the making of any statement in such manner or order as to mislead a reasonably prudent person to a false conclusion of a material fact; or

(4) any material misstatement of law; or

(5) any failure to disclose any matter required by law to be disclosed, including failure to make disclosure in accordance with the provisions of these sections and other applicable rules of the State Board of Insurance.

* * *

SUBCHAPTER 3. UNFAIR CLAIMS SETTLEMENT PRACTICES

§ 21.201. Short Title

These regulations shall be known as the Unfair Claims Settlement Practices Rules.

* * *

§ 21.203. Unfair Claim Settlement Practice

No insurer shall engage in unfair claim settlement practices. Unfair claim settlement practice means committing or performing with such frequency as to indicate a general business practice any of the following:

(1) Misrepresenting to claiments pertinent facts or policy provisions relating to coverages at issue.

(2) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies, provided that "pertinent communications" shall exclude written communications that are direct responses to specific inquiries made by the insurer after initial report of a claim. An acknowledgement within 15 working days is presumed to be reasonably prompt.

(3) failing to adopt and implement reasonable standards for prompt investigation of claims arising under its policies.

(4) not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear;

(5) compelling policyholders to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;

(6) failure of any insurer to maintain a complete record of all complaints which it has received during the preceding three years or since the date of its last examination by the Commissioner of Insurance, whichever time is shorter. . . .

(7) Failing to provide promptly, when provided for in the policy, claim forms when the insurer requires such forms as a prerequisite for a claim settlement.

(8) Not attempting in good faith to settle promptly claims where liability has become reasonably clear under one portion of the policy in order to influence settlement under other portions of the policy coverage. (This provision does not apply to those situations where payment under one portion of coverage constitutes evidence of liability under another portion of coverage).

(9) Failing to provide promptly to a policyholder a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(10) Failing to affirm or deny coverage of a claim to a policyholder within a reasonable time after proof of loss statements have been completed. The taking of a nonwaiver agreement or the submission of a reservation of rights letter by an insurer to the policyholder

within a reasonable time is deemed compliance with the provisions of this paragraph.

(11) Except as may be specifically provided in the policy, to refuse, fail, or unreasonably delay offer of settlement under applicable first-party coverage on the basis that other coverage may be available or third parties are responsible in law for damages suffered.

(12) Attempting to settle a claim for less than the amount to which a reasonable person would have believed she/he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(13) Undertaking to enforce a full and final release from a policyholder when, in fact, only a partial payment has been made. (This provision shall not prevent or have application to the compromise settlement of doubtful or disputed claims).

(14) Failing to establish a policy and proper controls to make certain that agents calculate and deliver to policyholders or their assignees funds due under policy provisions relative to cancellation of coverage within a reasonable time after such coverages are terminated.

(15) Refusing to pay claims without conducting a reasonable investigation based upon all available information.

(16) Failing to respond promptly to a request by a claimant for personal contact about or review of the claim.

(17) with respect to the Texas personal auto policy, to delay or refuse settlement of a claim solely because there is other insurance of a different type available to satisfy partially or entirely the loss forming the basis of that claim. The claimant who has a right to recover from either or both insurers is entitled to choose under which coverage and in what order payment is to be made.

* * *

§ 21.205. Minimum Standard of Performance

All insurers shall maintain their affairs so that no unfair claims settlement practices are committed and the minimum standard of performance for all insurers (as that term is used in the Insurance Code, Article 21.21-2) is to comply with the provisions of § 21.203 of this title (relating to Unfair Claims Settlement Practices).

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

No. 90-1682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. CATHEY and BETTE CATHEY,
Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
THE DOW CHEMICAL COMPANY, and
MICHAEL H. MADDOLIN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

---

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QUESTIONS PRESENTED

1. Are claims raised in the context of state-court proceedings that could have been raised in prior federal proceedings precluded from being reheard?

2. Does the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), pre-empt state laws providing remedies for alleged improper processing of a claim for ERISA benefits?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1682

JAMES C. CATHEY and BETTE CATHEY,
Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
THE DOW CHEMICAL COMPANY, and
MICHAEL H. MADDOLIN,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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CONSOLIDATED BRIEF IN OPPOSITION

The respondents, Metropolitan Life Insurance Company, The Dow Chemical Company, and Michael H. Maddolin, respectfully request that this Court deny the petition for writ of *certiorari*, seeking review of the judgment of the Supreme Court of Texas in this case. The opinion of the Supreme Court of Texas is reported at 805 S.W.2d 387 (1991).

STATEMENT OF THE CASE

Petitioner James C. Cathey, a former employee of respondent The Dow Chemical Company ("Dow") (A. 2),[1] and his wife, petitioner Bette Cathey, ask this Court to grant them relief on a claim for "twenty-four (24) hour a day nursing" care benefits under Dow's "Employee Benefit Plan" (R. 230; A. 2).[2] Petitioners' last request for identical relief came to an end in February of this year when this Court denied their petition for review of the Fifth Circuit's holding that "the Catheys are not entitled to around-the-clock nursing benefits" under the same Dow Plan here at issue. *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 556 (5th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3562, 111 S Ct. 964, 112 L Ed. 2d 1051 (1991) ("*Cathey-I*"); *see also* Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 90-960, (Dec. 12, 1990) ("Petition, *Cathey-I*").[3] Petitioners characterize *Cathey-I* as affording them "no effective relief." Petition for a writ of Certiorari to the Supreme Court of Texas, No. 90-1682, at 5, n.1 (April 30, 1991) ("Petition, *Cathey-II*").

Cathey-I was filed in Texas state court and removed to federal district court under the civil enforcement provi-

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[1] All "A." references are to the Appendix of the Petiiton for a Writ of Certiorari to the Supreme Court of Texas; all "R." references are to the Record on Appeal before the Supreme Court of Texas.

[2] The Dow Plan is sponsored by Dow (A. 2), with respondent Metropolitan Life Insurance Company ("MetLife") acting as "claims administrator" (A. 2; R. 230). *See also Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 556 (5th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3562, 111 S. Ct. 964, 112 L. Ed. 2d 1051 (1991). Mr. Cathey is retired. 907 F.2d at 555. The requested nursing benefits are for Mrs. Cathey, a dependent beneficiary under the Dow Plan. *Id.*

[3] Only the plan itself—The Dow Chemical Company Medical Care Program—was named as defendant in petitioners' federal action. 907 F.2d at 554.

sions of ERISA, section 502, 29 U.S.C. 1132. *See* 907 F.2d at 555.[4] By their present action, also commenced in the state courts of Texas ("*Cathey-II*"), petitioners seek to obtain relief under section 16 of article 21.21 of the Texas Insurance Code ("section 16").

Section 16 provides remedies to private litigants purportedly injured by various "acts or practices" specified by section 4 of article 21.21 of the Texas Insurance Code, the regulations of the Texas State Board of Insurance, and section 17.46 of the Texas Business & Commerce Code, commonly known as the Texas Deceptive Trade Practices Act.[5] *See* Petition, *Cathey-II* at 5, 12. The Catheys refused a court-ordered opportunity to amend their Texas petition to "state an ERISA cause of action" (A. 2; *see also* A. 32), notwithstanding the fact that they voluntarily amended their Texas petition twice for reasons of their own choosing (*see* R. 230). The Supreme Court of Texas, citing controlling authority of this Court,[6] ultimately held that petitioners' section 16 claim was preempted by ERISA because "[s]ection 16 . . . provide[s] recovery that was not included under ERISA" (A. 8). The Texas Supreme Court therefore affirmed summary judgment in respondents' favor (A. 1, 9). It is that grant of summary judgment, decided by the Supreme Court of Texas "in a way that [*comports*] with applicable decisions of this Court," *see* Rule 10.1(b), U.S. Sup. Ct. (1991), that petitioners ask this Court to review for alleged error.

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[4] By commencing their action for nursing benefits under ERISA, petitioners necessarily conceded that the Dow Plan was an ERISA plan.

[5] Tex. Ins. Code Ann. art. 21.21 § 16(a), (b) (Vernon Supp. 1991); *see also id.* § 2(b) (defining "Board").

[6] *E.g., Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (*see* A. 4, 6, 10-11).

By their Petition for a Writ of Certiorari in *Cathey-I*, the Catheys asked this Court to consider the following question:

> Can ERISA preempt a state law regulating unfair insurance practices that was enacted pursuant to the McCarran-Ferguson Act, notwithstanding the language of the "saving clause" in 29 U.S.C. § 1144 (b) (2) (A) that explicitly saves from preemption "any law of any State which regulates insurance"?

Petition, *Cathey-I* at ii. Only four months ago, petitioners boldly stated, in their Reply to respondent's opposition to the Petition in *Cathey-I*, that "[t]he issue of [ERISA] preemption is *now* ripe for consideration." Petitioners' Reply Brief, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 90-960, 3 ("Reply, *Cathey-I*") (emphasis added). This Court denied that Petition, 59 U.S.L.W. at 3562, 111 S. Ct. at 964, 112 L. Ed. 2d at 1051, and should similarly deny the Petition in the present, related case.

The question raised by the Petition in *Cathey-II* reworks only slightly the above-quoted question from *Cathey-I* to reflect petitioners' continuing view that this Court's opinion in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), was too broadly decided:

> Is this Court's decision in *Pilot Life Insurance Co. v. Dedeaux* properly read to require preemption of a state law regulating unfair insurance practices, even though § 1144 (b) (2) (A) of ERISA expressly saves from preemption "any law of any State which regulates insurance"?

Petition, *Cathey-II* at i. Although the question as phrased in *Cathey-I* did not explicitly refer to *Pilot Life* (which petitioners now dub a "problem," Petition, *Cathey-II* at 18), petitioners' briefs in *Cathey-I* did. Then as now, petitioners argued that whether section 16 was preempted by ERISA "turn[ed] on the proper reading of

Pilot Life." Reply, *Cathey-I* at 3; *see also* Petition, *Cathey-II* at 3. Then as now, petitioners called on this Court "to reconcile ERISA's preemption and saving clauses . . .," Petition, *Cathey-II* at 3, by "explain[ing] how" (as petitioners put it) "the saving clause can be effectively read out of ERISA in deference to the preemption clause." Reply, *Cathey-I* at 3.

Not only are the questions raised in both *Cathey* Petitions the same,[7] but there is only one set of facts present —the facts scarcely referenced in the Catheys' current Petition. It should be remembered that arguments in both Petitions relate to the Catheys' contention that their claim for 24-hour-a-day nursing care benefits under the Dow Plan was wrongly denied—a claim the Fifth Circuit previously laid to rest by rejecting it. 907 F.2d at 561. It should also be noted that while neither the record in *Cathey-I* nor the record in *Cathey-II* explain why, it was *the Catheys* who *selected* the health benefits under Dow's so-called "New Plan" of which they continue to complain.[8] Moreover, while the Fifth Circuit held, ni *Cathey-I*, that petitioners were "not entitled to around-the-clock nursing benefits," it nevertheless also held that they were "minimally entitled to fifty home visits annually," provided that conditions for Plan coverage were otherwise met. *Id.* It is *that* holding, in *Cathey-I*, which the Supreme Court of Texas, in *Cathey-II*, acknowledged as affording peti-

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[7] Petitioners raised additional questions in *Cathey-I*, not relevant to the instant Petition. *See* Petition, *Cathey-I* at ii.

[8] The Fifth Circuit held that the Catheys were bound by "*their* selection" of the benefits available under the "New Plan." 907 F.2d at 560 (emphasis added). The reason for that selection, although not explicitly stated, may be surmised. As the Fifth Circuit noted in *Cathey-I*, the "Old" Dow Plan contained a "total *lifetime* maximum of *$50,000*" on the nursing benefits here at issue, 907 F.2d at 556 (emphasis added), while the New Plan had no specific dollar cap on nursing benefits other than the comprehensive plan limit of *$1,000,000* (R. 65), "albeit [the Plan does] not [cover] beyond fifty home visits annually." 907 F.2d at 561.

tioners "partial recovery on their ERISA claim" (A. 2, n. 1), but which petitioners characterize as affording them "no effective relief." Petition, *Cathey-II* at 5, n.1.

The *Cathey-II* Texas petition sought to obtain what petitioners would apparently deem "effective relief." It demanded an award of "actual damages" under Texas state law in excess of the "just sum of ONE MILLION DOLLARS ($1,000,000.00) for the [respondents'] breach of duty to [petitioners]" (R. 234), plus "treble the amount of actual damages they may show themselves entitled to as a matter of law" (R. 234), as well as "exemplary damages in the amount sufficient to punish [respondents] and to deter others from being tempted to engage in the same or similar conduct" to that in which respondent purportedly engaged (R. 235). While petitioners now seek to "limit this appeal [*sic*] to their claims under the Texas Insurance Code, article 21.21, § 16," Petition, *Cathey-II* at 5, the fact remains that petitioners demanded the forgoing relief in part, as an "[*a*]*lternative*[]" to their request for "payment of past, present and future benefits" under the Dow Plan (R. 230, 232) (emphasis added).

Petitioners have already *obtained* relief under the Dow Plan. 907 F.2d at 561. They simply consider it "[in]effective." Petition, *Cathey-II* at 5, n.1. That view reveals the shallowness of petitioners' arguments. Petitioners do not call on this Court to balance "the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefits plans" which Congress achieved in enacting ERISA. *Pilot Life*, 481 U.S. at 54. Rather, petitioners seek to destroy that balance by grafting onto ERISA's "exclusive" remedial scheme[9] a string of state-law remedies which ERISA excludes but which *petitioners*—as opposed to Congress—apparently deem "effective."

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[9] *Pilot Life*, 481 U.S. at 54, 57; *Ingersoll-Rand Co. v. McClendon*, —— U.S. at ——, 111 S. Ct. at 485, 112 L. Ed. 2d at 487 (1990).

REASONS THE PETITION SHOULD BE DENIED

I. BECAUSE THE QUESTION PETITIONERS RAISE IS BARRED UNDER THE "CLAIM PRECLUSION" DOCTRINE, PETITIONERS RAISE NOTHING FOR THIS COURT TO REVIEW.

Rule 10 of this Court permits the discretionary writ of *certiorari* to be granted "*only* when there are special and important reasons therefor." (Emphasis added). Because the present Petition raises no more than the question this Court previously addressed and answered in *Pilot Life* and *Ingersoll-Rand Co. v. McClendon* and declined to revisit in *Cathey-I*, there is nothing for the Court to reconsider which is either "special" or "important."

Indeed, for the Court to review the question it previously declined to revisit in *Cathey-I* would defeat the doctrine of "claim preclusion," endorsed by this Court in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984). Claim preclusion refers to "the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit." *Id.* As part of the doctrine of "*res judicata*," it serves the goal of leaving parties (and courts) who have worked their way through facts and legal theories to judgment in final repose.[10]

Claim preclusion is properly enforced when the "gist" of two actions is the same, or when the evidence required in a prior proceeding (or which would have been required, had all claims relevant to the same transaction been

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[10] As the eminent authority on federal practice and procedure has put it, doctrines under the umbrella of "*res judicata*"—of which "claim preclusion" is one—focus

> on the need to protect a victorious party against oppression by a wealthy, wishful, or even paranoid adversary. Some opinions reflect an additional concern with protecting an unsuccessful party against his own folly in risking a second try.

18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4403 at 14 (1981). In *Migra*, 465 U.S. at 77 n.1, this Court

tested) is the same as in a subsequent proceeding.[11] 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4407, 60-61 (1981); *see also Herendeen v. Champion Int'l Corp.*, 525 F.2d 130, 133-34 (2d Cir. 1975); *Moreno v. Marbin Productions, Inc.*, 296 F.2d 543, 544 (2d Cir. 1961). It is enforceable by parties to a second action who are either the same as those to a prior suit or who "bore such a relationship to the first suit or to the parties [to it]" that it is proper to preclude new claims relating to the same transaction from being litigated, thereby preserving the desired state of repose. *Migra*, 465 U.S. at 84; 18 Wright, *supra*, § 4406 at 45, 47.

There can be no question that the "gist" of *Cathey-I* and *Cathey-II* is the same or that the parties to both actions "bore such a relationship" to each other that it is proper for the final judgment in *Cathey-I* to bar petitioners from continuing to litigate the legal significance of their invalid claim for 24-hour-a-day nursing care benefits under the Dow Plan. Both actions alleged the same entitlement to the same benefits under the same employee benefit plan. *Compare* 907 F.2d at 555-56 *with* R. 229-31. In both actions, petitioners maintained that MetLife, acting through one of its agents (respondent Michael H. Maddolin), wrongly denied their invalid claim. *Compare* 907 F.2d at 555-57 *with* R. 229-31. The petitioners in both actions are identical, and while the

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referred to Wright *et al.*, *supra*, as "helpful" in gaining a better understanding of "claim preclusion."

[11] A proceeding is "prior," for purposes of claim preclusion, if a judgment in that proceeding is rendered "prior" to the entry of judgment in subsequent or parallel proceedings. Wright *et al.*, *supra*, § 4404 at 23-24. In the present case, because the prior proceeding arose under federal law, 907 F.2d at 555-56, this Court need not consider the impact of claim preclusion under Texas law, as the Court was required to do with regard to the prior Ohio proceedings at issue in *Migra*. *See* 465 U.S. at 85-87.

named respondents differ,[12] the Plan sued in *Cathey-I* only acts through its fiduciaries and their employees—namely, through Dow, MetLife, and employees such as respondent Moddolin—a fact which the Fifth Circuit's opinion in *Cathey-I* made abundantly clear by referring, either expressly or generically, to each respondent to the present Petition. *See* 907 F.2d at 555-557. Absolute privity among the parties to both actions therefore exists. Moreover, as *Pilot Life*, *Ingersoll-Rand* and a multitude of other lawsuits demonstrate, many ERISA benefit actions are brought against employers, as ERISA-plan sponsors, or insurance companies, as either claims administrators or insurers of the benefits that many plans provide, rather than against the plan itself. *See, e.g.*, *Pilot Life*, 481 U.S. at 43; *Ingersoll-Rand*, —— U.S. at ——, 111 S. Ct. at 481, 112 L. Ed. 2d at 481. In any event, *these* petitioners *had* the opportunity to combine their present allegations with an ERISA cause of action (A. 32), they simply chose not to take it (A. 2). Nothing separates *Cathey-I* from *Cathey-II* but petitioners' own refusal to amend their pleadings, in their attempt to try the same case before different judicial forums, in the hope that they would somehow obtain what they deem "effective relief."

Finally, and conclusively, it is irrefutable that petitioners could or should have raised their section 16 claim in the context of *Cathey-I*, because they *did* raise it, by their prior Petition to this Court. Petition, *Cathey-I* at ii. Petitioners' suggestion that it is *now* time for this Court "to reexamine and clarify its decision in *Pilot Life*," Petition, *Cathey-II* at 3, is a subterfuge.[13] That is

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[12] The federal action named only the Dow Plan as defendant; the current state-court action names Dow, MetLife and Michael H. Maddolin, a MetLife employee responsible for claim processing under the Dow Plan, as defendants.

[13] Petitioners overlook the fact that this Court *did* reexamine, clarify, and staunchly adhere to its *Pilot Life* decision as recently

precisely what petitioners argued last time. Reply, *Cathey-I* at 1, 3. What petitioners *really* want is a second bite at the apple. They should not get it. There is nothing in *Cathey-II* that should not or could not have been addressed in *Cathey-I*, or vice-versa. Petitioners may not squeeze under the claim-preclusion bar and squander precious judicial resources by trying different legal theories before different judicial bodies, in their repetitive bid for disparate judicial relief. They are precluded, by the final judgment in *Cathey-I*, from further pursuing their section 16 claim, which this Court previously declined to consider. *See* 59 U.S.L.W. at 3562, 111 S. Ct. at 964, 112 L. Ed. 2d at 1051; *see also Migra*, 465 U.S. at 77 n.1, 84-85; *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

II. BECAUSE THE JUDGMENT OF THE SUPREME COURT OF TEXAS COMPORTS WITH APPLICABLE DECISIONS OF THIS COURT, THERE IS NOTHING "SPECIAL" OR "IMPORTANT" FOR THIS COURT TO REVIEW.

ERISA "supersedes any and all State laws[14] insofar as they may now or hereafter *relate to* any *employee benefit plan* . . .," ERISA § 514(a), 29 U.S.C. § 1144(a)

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as December of last year, when it found that ERISA preempts remedies arising under the wrongful discharge laws of the very State from which the present petitioners hail—Texas. *Ingersoll-Rand*, —— U.S. at ——, 111 S. Ct. at 481, 485-86, 112 L. Ed. 2d 481-82, 487-88. Moreover, while the Petition in *Cathey-II* makes no mention of *Ingersoll-Rand* (except insofar as it is cited by the Texas Supreme Court in materials contained in the appendix to the Petition), petitioners did cite *Ingersoll-Rand* in their Reply in *Cathey-I*, indicating that petitioners knew this Court had revisited its *Pilot Life* holding only five months ago. *See Reply, Cathey-I* at 2.

[14] For purposes of ERISA § 514, 29 U.S.C. § 1144, " 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . ." *Id.* § 514(c)(1), 29 U.S.C. § 1144(c)(1).

(emphasis added), but saves from pre-emption "any State law which regulates insurance, banking, or securities." [15] ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) (emphasis added). Petitioners concede (as they must) that their section 16 claim "relate[s] to" Dow's ERISA plan (*see* R. 231; *see also Cathey*, 907 F.2d at 555-56). They argue, however, that section 16 is saved from pre-emption by ERISA's saving clause. Petition, *Cathey-II* at 14-28. According to petitioners, section 16 "undeniably" regulates insurance. Petition, *Cathey-II* at 17.

Petitioners' assertion has previously been denied by the Fifth Circuit, which held that section 16 does *not* "regulate insurance" within the meaning of ERISA's saving clause. *Ramirez v. Inter-Continental Hotels*, 890 F.2d 760, 763 (1989). Moreover, *this* Court, only six months ago, in holding that ERISA pre-empts the Texas wrongful-discharge law insofar as it provides "a remedy for the violation of a right expressly guaranteed by § 510 [of ERISA] and exclusively enforced by § 502(a)," *unanimously* reiterated that ERISA's civil enforcement scheme *is* "exclusive." *Ingersoll-Rand*, —— U.S. at ——, 111 S. Ct. at 486, 112 L. Ed. 2d at 488.[16] In reaching that conclusion, this Court reversed the Supreme Court of Texas, which had found to the contrary. *See McClendon v. Ingersoll-Rand Co.*, 779 S.W. 2d 69 (1989). It should, therefore, come as no surprise that in *Cathey-II* three concurring justices of the Supreme Court of Texas made

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[15] ERISA defines "employee benefit plan[s]" to include "employee *welfare* benefit plan[s]." ERISA § 2(3), 29 U.S.C. § 1002(3) (emphasis added). The latter include plans which supply "medical, surgical, or hospital care or benefits." ERISA § 2(1), 29 U.S.C. § 1002(1).

[16] All Justices joined in Part II-B of the Court's opinion in *Ingersoll-Rand*, which reiterates that ERISA's civil enforcement provisions are "exclusive." —— U.S. at ——, 111 S. Ct. at 480, 112 L. Ed. 2d at 481; *see also* 111 S. Ct. at 484-86.

special reference to this Court's decision in *Ingersoll-Rand*, calling *Ingersoll-Rand* (which had just been decided) and *Pilot Life* into question (A. 10-11). What is equally clear is that even the Texas Supreme Court justices who concurred in *Cathey-II* "[r]ecogniz[ed] that *Ingersoll-Rand* . . . and *Pilot Life* . . . control this case . . ." (A. 10-11) and required them to find that ERISA pre-empts section 16 (A. 11).

Pilot Life held that, because the addition of state-law remedies would destroy the delicate balancing of interests Congress had achieved when *it* determined which remedies *should* be available in ERISA benefit actions, state-law remedies relating to claims for benefits under an ERISA plan would be pre-empted. 481 U.S. at 55-57. That point was hammered home and expanded by this Court's decision in *Ingersoll-Rand*, which held that although ERISA does not expressly pre-empt all state-law remedies, under the doctrine of implied pre-emption, state "cause[s] of action w[ill] be pre-empted" if they "conflict[] directly with an ERISA cause of action." —— U.S. at ——, 111 S. Ct. at 484-85, 112 L. Ed. 2d at 486.[17] In reaching that conclusion, this Court noted that it had "examined [section 502(a) of ERISA] at some length" in *Pilot Life*, and set forth *again*, in its entirety, the underpinning rationale it had previously stated:

> "[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion

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[17] A state-law remedy conflicts with ERISA if it provides a remedy for rights "expressly guaranteed" by ERISA and exclusively enforced by section 502(a), 29 U.S.C. § 1132(a). —— U.S. at ——, 111 S. Ct. at 486, 112 L. Ed. 2d at 488. The rights at issue in *Ingersoll-Rand* arose under section 510 of ERISA, 29 U.S.C. § 1140, which guarantees against interference with protected ERISA rights. *Id.*

> of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute, as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" 418 U.S., at 54 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

Ingersoll-Rand, —— U.S. at ——, 111 S. Ct. at 485, 112 L. Ed. 2d at 487 (emphasis in original).

The import of ERISA's implied pre-emption of state-law remedies has not been lost on any jurisdiction. The State of California, for example, in finding that ERISA pre-empted California statutory remedies similar to those at issue in the present case, noted as early as 1988 that

> [W]hile [ERISA's] saving clause may allow states to enact statutes that regulate the *substantive* terms of insurance policies [citation omitted], the clause does not allow states to enact statutes that provide conflicting *procedural remedies* (see *Pilot Life*, supra, 107 S. Ct. at pp. 1555-1558). A contrary rule would undermine ERISA's important policy of promoting uniformity in employee benefit-law remedies, by creating the potential for conflicting standards of recovery. [Citation omitted.]

Commercial Life Ins. Co. v. Superior Court, 47 Cal. 3d 473, 484, 764 P.2d 1059, 1066, 253 Cal. Rptr. 682, 689 (Cal. 1988), *cert. denied sub nom., Juliano v. Commercial Life Ins. Co.*, —— U.S. ——, 109 S. Ct. 2087, 104 L. Ed. 2d 651 (1989) (emphasis in original).[18] Indeed, a year

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[18] The "only case decided after *Pilot Life*" to which petitioners are able to point as alleged support for their request that this Court reconsider its *Pilot Life* holding— *Goodrich v. General Tel. Co. of Calif.*, 195 Cal. App. 3d 675, 241 Cal. Rptr. 640 (1987)—is an intermediate California decision. That decision was

before this Court's *Ingersoll-Rand* decision, the Fifth Circuit had already concluded that section 16 conflicted with, and therefore was pre-empted by, ERISA's "exclusive" remedial scheme, 890 F.2d at 763-64 (citing *Pilot Life*). Other jurisdictions have reached similar conclusions. *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190 (8th Cir. 1988) (Missouri statute prohibiting vexatious refusal to pay insurance claims pre-empted by ERISA); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S. Ct. 3216, 106 L. Ed. 2d 566 (1989) (California statute prohibiting unfair insurance claims processing pre-empted by ERISA); *Kelly v. Sears, Roebuck and Co.*, 882 F.2d 453 (10th Cir. 1989) (ERISA pre-empts Colorado bad-faith insurance law); *Anschultz v. Connecticut Gen. Life Ins. Co.*, 850 F.2d 1467 (11th Cir. 1988) (Florida statute providing private right of action to persons injured by violations of state's insurance code pre-empted by ERISA); *McManus v. Travelers Health Network of Florida*, 742 F. Supp. 377 (W.D. Tex. 1990) (Texas common-law remedies and remedies under the Texas Deceptive Trade

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effectively overruled a year later by the definitive ruling of the Supreme Court of California in *Commercial Life*, which held that the same California statute at issue in *Goodrich*, which provided remedies for "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance," was pre-empted by ERISA, as required by this Court's holding in *Pilot Life*. 47 Cal. 3d at 483-84, 764 P.2d at 1065-66, 253 Cal. Rptr. at 688-89. In its discussion of the applicable law in *Commercial Life*, the California Supreme Court did not even refer to *Goodrich*, although it did discuss *Kanne*, *infra*, and other decisions consistent with its holding. *See* 47 Cal. 3d at 482-83, 764 P.2d at 1064-65, Cal. Rptr. at 687-88. It subsequently vacated the lower court's opinion in *Goodrich* and transferred the matter to the "Court of Appeal, Second Appellate District, . . . with directions . . . to reconsider in light of *Commercial Life* . . . ." *Goodrich v. General Tel. Co.*, 773 P.2d 450, 259 Cal. Rptr. 64 (1989). Hence, the case law to which petitioners point ultimately establishes the remarkable unanimity of opinion on the question they raise.

Practices Act pre-empted by ERISA);[19] *Cramer v. Association Life Ins. Co., Inc.*, 569 So. 2d 533 (La. 1990), *cert. denied*, 59 U.S.L.W. 3652, 111 S. Ct. 1391, 113 L. Ed. 2d 447 (1991) (remedial provisions of Louisiana Insurance Code pre-empted by ERISA). The State of Texas, by virtue of its opinion in the present case, now stands in line with that substantial body of law (A. 7-8, 10-11).

Petitioners nevertheless persist in alleging that some act of respondents, which allegedly deprived them of 24-hour-a-day nursing benefits under the Dow Plan (R. 230-31), entitles them to exploit state-law remedies under section 16, even though the Fifth Circuit previously determined that petitioners have no right to benefits for around-the-clock nursing care. *Cathey-I*, 907 F.2d at 561. Assuming, *arguendo*, that some act of respondents *did* interfere with petitioners' ERISA rights (and respondents maintain that, pursuant to *Cathey-I*, no such allegation is sustainable), petitioners are nevertheless barred from obtaining state law remedies under section 16. The claim of petitioners for section 16 remedies is, at bottom, no more than a claim for ERISA benefits, or a claim based on alleged interference with protected ERISA rights. The "exclusive" remedy for both claims is section 502(a) of ERISA, 29 U.S.C. § 1132(a). *Ingersoll-Rand*, —— U.S. at ——, 111 S. Ct. at 485, 486, 112 L. Ed. 2d at 487, 488; *Pilot Life*, 481 U.S. at 56-57. Petitioners'

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[19] Petitioners cite to *Mayfield v. Hartford Ins. Co.*, 699 F. Supp. 605 (W.D. Tex. 1988), as an "opinion that . . . correctly recognizes that article 21.21 [of the Texas Insurance Code] fits within the saving clause as a law regulating insurance . . . ." Petition, *Cathey-II* at 17. In *McManus v. Travelers Health Network of Texas*, the United States District Court for the Western District of Texas, with respect to its decision in *Mayfield*, stated as follows: "The Court hereby disapproves of and withdraws that opinion." 742 F. Supp. at 382. Petitioners do not acknowledge *Mayfield*'s withdrawal.

section 16 claim therefore conflicts with ERISA causes of action and is pre-empted by ERISA, *see Ramirez*, 890 F.2d at 763-64, a conclusion with which the justices of the Texas Supreme Court agree (A. 1-3, 10-11). This Court should accordingly decline petitioners' invitation to slide state-law remedies which "relate to" ERISA plans under a legal microscope once again, as it did three and a half months ago in *Cathey-I*, 59 U.S.L.W. at 3562, 111 S. Ct. at 964, 112 L. Ed. 2d at 1051 (with respect to the same statutory provisions petitioners ask this Court to reconsider), and as it did two months ago, with respect to similar remedial provisions arising under the Louisiana Insurance Code. *Cramer*, 569 So. 2d at 533, *cert. denied*, 59 U.S.L.W. at 3652, 111 S. Ct. at 1391, 113 L. Ed. 2d at 447.[20] There is nothing to "reexamine and clarify" with respect to ERISA pre-emption of state-law remedies for alleged improper handling of ERISA benefit claims or alleged interference with protected ERISA rights which has not been amply and precisely disposed of by this Court's prior opinions in *Pilot Life* and *Ingersoll-Rand*.

* * *

This Court's controlling holdings with respect to ERISA's implied pre-emption of conflicting state-law remedies are not the only bases under ERISA for denying the present Petition. The private remedies available to Texas consumers, which petitioners seek under section 16, do not, in any event, "regulate insurance" within the meaning of ERISA's saving clause. In *Pilot Life*, this Court confronted the question of whether a Mississippi

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[20] The opinion of the Louisiana Supreme Court, which concluded that remedial provisions of the Louisiana Insurance Code were pre-empted by ERISA, relied not only on *Pilot Life* but also on *Ramirez*, in which the Fifth Circuit held that section 16 was pre-empted by ERISA. *Cramer*, 569 So. 2d at 539.

cause of action based on the alleged bad-faith processing of an insurance claim was saved from ERISA pre-emption. 481 U.S. at 44. This Court found that while the Mississippi law of "bad faith" was "identified . . . with the insurance industry," *id.* at 50, its roots were firmly planted in general principles of tort and contract law. *Id.* at 50. As a result, a "common sense" understanding of the phrase "regulates insurance" inescapably required the conclusion that the broader base of "bad faith" law in Mississippi could support *any* breach of contract claim. *Id.* Such comprehensive state laws do *not* "regulat[e] insurance" within the meaning of ERISA's "saving clause" and *are* subject to ERISA pre-emption. *Id.*

Section 16, like the Mississippi bad-faith law at issue in *Pilot Life*, traces its roots to the law of torts and contracts and was enacted by the Texas legislature specifically to alter or eliminate some defenses that had developed under the common law, thereby providing what Texas deemed necessary *consumer* protections.[21] *See, e.g.*,

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[21] In their *Cathey-II* Petition, petitioners studiously avoid a firm characterization of what lies at the heart of their section 16 claim, undoubtedly because it resembles the Mississippi bad-faith claim pre-empted in *Pilot Life*. Stray references to "representations" allegedly made to petitioners, Petition, *Cathey-II* at 4, and to "misrepresentations" vaguely connected with insurance, *id.* at 12, 13, however, indicate that "misrepresentation" of some sort is probably at issue. A close reading of even the aforementioned loose allegations indicates Dow is accused of representing that the Catheys "were *covered*" under the employee benefit plan, *id.* at 4 (emphasis added), and that MetLife, acting through its agent, then "refused to continue paying for Bette Cathey's [24-hour-a-day] nurse, despite the earlier representations" of Dow. *Id.* at 4. Dow's "representation" was correct—the Catheys *were* covered under the Dow Plan. *Cathey-I*, 907 F.2d at 555—and petitioners were *not* entitled to 24-hour-a-day nursing care. *Id.* at 561. Petitioners' arguments are

Note, *Consumer Protection—Breach of Warranty Merger Doctrine No Defense to Deceptive Trade Practices Suit for Breach of Express Warranty, Alvarado v. Bolton, 749 S.W.2d 47 (Tex. 1988)*, 20 St. Mary's L.J. 689, 690-91 (1989); Note, *Insurance—Deceptive Trade Practices—Private Cause of Action for Unfair Insurance Claim Settlement Practices Exists Under Texas Deceptive Trade Practices Act and Insurance Code*, 20 St. Mary's L.J. 707, 707-09 (1989). Section 16 is simply one piece of an overall statutory framework which focuses, in part, upon the insurance industry but was designed to "encompass virtually every area of consumer protection" in the State of Texas. Note, *The 104(a)(2) Personal Injury Exclusion and the Texas Deceptive Trade Practices Act: A Possible Exclusion*, 41 Baylor L. Rev. 563, 564 (1989). It, together with the Texas Deceptive Trade Practices Act,[22] were enacted to make clear that "disgruntled Texas consumers have a powerful weapon in their hands." *Id.* at 565. That "weapon" includes treble damages and attorney's fees. Tex. Ins. Code Ann. art. 21.21 § 16(b); see also *McManus v. Travelers Health Network*, 742 F. Supp. at 380-81 (remedy of treble damages under Texas Deceptive Trade Practices Act pre-empted by ERISA); *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988) (insured's rights of remedial relief under article 21.21 of the Texas Insurance Code and under the Texas Deceptive Trade Practices Act are not mutually exclusive; each incorporates the other).

Indeed, even petitioners concede that section 16, *on its face*, sweeps into its scope all violations actionable

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therefore not only fatally flawed as a matter of law, they are without factual merit.

[22] *See, e.g.*, Tex. Bus. & Com. Code Ann. § 17.50(a) (Vernon 1987) (indicating the actions consumers may bring to obtain damages, including actions pursuant to Article 21.21 of the Texas Insurance Code).

under section 17.46 of the Texas Deceptive Trade Practices Act (A. 12), which is aimed at all business entities within its scope, not only at insurers, as the Supreme Court of Texas, *see Vail*, 754 S.W.2d at 135, and the Fifth Circuit, *see Ramirez*, 890 F.2d at 763, have recognized (*see also* A. 8). Common sense dictates that section 16 is therefore part of a comprehensive enforcement scheme designed to redress *all* unfair or deceptive *trade* practices in Texas, and as such is a law of general application which cannot be saved from ERISA pre-emption. *Pilot Life*, 481 U.S. at 50.

This Court has also adopted the McCarran-Ferguson Act test as a tool for determining when a state law "regulates insurance" within the meaning of ERISA's saving clause. *Pilot Life*, 481 U.S. at 48-49. As the Fifth Circuit previously found, section 16 fails that test. *Ramirez*, 890 F.2d at 763-64.

Under the McCarran-Ferguson Act test, three criteria are evaluated to determine if a particular practice falls within the "business of insurance" and therefore "regulates insurance" within the meaning of ERISA's saving clause. *Pilot Life*, 481 U.S. at 47, 51; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-43 (1985). The three criteria are:

> "[*F*]*irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry."

481 U.S. at 48-49 (emphasis in original) (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

Section 16 fails to meet all three criteria. It does not spread or transfer any risk. *Ramirez*, 890 F.2d at 763. Risk spreading occurs when the parties to an insurance contract enter into it, not when some after-the-fact event

occurs, such as the payment or denial of a benefit claim under a previously-transferred risk or the commencement of a lawsuit for such a benefit, as in the present case. *See Union Labor Life Ins. Co. v. Pireno*, 548 U.S. 119, 130 (1982). Nor is section 16 "integral" to the relationship between any insurer and an insured; rather, "it declares only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract" may in some cases entitle a "person" to treble damages, plus attorney's fees. *Ramirez*, 890 F.2d at 763; *see also Pilot Life*, 481 U.S. at 51; *Insurance Board v. Muir*, 819 F.2d 408, 411-13 (3d Cir. 1987); Tex. Ins. Code Ann. art. 21.21 § 16(b) (Vernon Supp. 1991). Finally, section 16 is not limited to entities within the insurance industry. Petitioners themselves claim a "*private*" right of action under the statute (Petition, *Cathey-II* at 12), which sweeps into its scope unfair and deceptive trade practices in which virtually any business entity in the State of Texas may engage. *See Vail*, 754 S.W.2d at 135; *see also* Tex. Ins. Code Ann. art. 21.21 § 16(a) (Vernon Supp. 1991) (incorporating section 17.46 of the Texas Business & Commerce Code). Because section 16 fails each requirement of the McCarran-Ferguson Act test, it does not "regulat[e] insurance" within the meaning of ERISA's saving clause and is not saved from ERISA pre-emption. *Pilot Life*, 481 U.S. at 50; *Ramirez*, 890 F.2d at 763.

CONCLUSION

Petitioners are precluded by the final judgment in *Cathey-I* from litigating claims that could or should have been raised in that action. Moreover, the decision of the Texas Supreme Court, which petitioners ask this Court to review, comports with the applicable decisions of this Court. There is nothing "special" or "important" under Rule 10 for this Court to consider. The Petition should therefore be denied.

Respectfully submitted,

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Dated: New York, New York
June 3, 1991

APPENDIX

APPENDIX

LIST NAMING ALL PARENT COMPANIES AND SUBSIDIARIES OF RESPONDENTS METROPOLITAN LIFE INSURANCE COMPANY AND THE DOW CHEMICAL COMPANY, AS REQUIRED BY RULE 29.1 OF THIS COURT

Metropolitan Life Insurance Company

ASSET MANAGEMENT INTERNATIONAL, INC.
ASSOCIATED ADVISORS FUND, INC.
CS FIRST BOSTON GLOBAL FUND MANAGERS LTD.
DTSS INCORPORATED
EUROPEAN & PACIFIC INVESTMENT MANAGEMENT
GENESIS SEGUROS GENERALES, SOCIEDAD ANONIMA DE SEGUROS Y REASEGUROS
KOLON-MET LIFE INSURANCE CO., LTD.
MECCO HOLDING, INC.
MET LIFE INTERNATIONAL REAL ESTATE EQUITY SHARES, INC.
METLIFE AGRICULTURAL CREDIT CORP.
METLIFE FINANCIAL SERVICES, INC.
METLIFE FUNDING, II, INC.
METLIFE HEALTHCARE NETWORK OF CALIFORNIA, INC.
METLIFE HEALTHCARE NETWORK OF NORTHEAST FLORIDA, INC.
METPARK FUNDING, INC.
METROPOLITAN LIFE FOUNDATION
METROPOLITAN MANAGEMENT COMPANY
METROPOLITAN SERIES FUND, INC.
METROPOLITAN STRUCTURES WEST, INC.
MONTREAL INVESTMENT MANAGEMENT
MORGUARD RESOURCES LIMITED
NATIONAL ELECTRONIC INFORMATION CORPORATION

PARKCOMMUNICATIONS, INC.
QUADREAL CORPORATION
SANTANDER MET, S.A.
SEGUROS GENESIS, S.A.
TORONTO INVESTMENT MANAGEMENT
UR HOLDING COMPANY, INC.
VANBRIT INVESTMENT MANAGEMENT

The Dow Chemical Company

Aardvark Limited
Agron Inc.
Airco Generon Systems LP
Anticorrosivos Industriales Limitada
Arabian Chemical Company Limited
Bear Mountain CoGen, Inc.
Biochimica Del Balento S.p.A.
Brea Canyon CoGen, Inc
BCC CoGen, Inc.
Canary Moving Limited
Carleton Shipping and Leasing Corporation
Carleton Shipping and Leasing Limited
Chalk Cliff CoGen, Inc.
Chimtrade
Compagnie des Services Dowell Schlumberger S.A.
Conklin IPP, Inc.
Corona Energy Corporation
CoGen Admin Services, Inc.
CoGen Kern Bluff, Inc.
CoGen Lime Rock
CoGen Lynchburg, Inc.
CoGen Lyondell, Inc.
CoGen Poso Creek, Inc.
CoGen Power, Inc.
CoGen Terrace Bay, Inc.
Cranley Corporation Limited
Cromarty Petroleum Co. Limited
CC CoGen, Inc.
CEC Prime, Inc.

Dartigue Limited
Destec Energy, Inc.
Destec Engineering, Inc.
Destec Fuel Resources, Inc.
Destec Holdings, Inc.
Destec Operating Company
Destec Ventures, Inc.
Devonshire Underwriters Limited
Dexco Polymers
Donichem Chemical KFT
Double "C" CoGen, Inc.
Dow Chemical Iberica S.A.
Dow Corning (Korea) Ltd.
Dow Corning (Thailand) Ltd.
Dow Corning (UK) Management Ltd.
Dow Corning de Argentina S.A.I.C.
Dow Corning de Colombia, S.A. (Siliconas de Colombia Limitad a)
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuela S.A.
Dow Corning do Brasil Ltde.
Dow Corning Africa Silicones Inc.
Dow Corning Australia Pty. Ltd.
Dow Corning Canada, Inc.
Dow Corning Construction S.A.
Dow Corning Coordination Center S.A.
Dow Corning Corporation
Dow Corning Enterprises, Inc.
Dow Corning Foreign Sales Corporation, Inc.
Dow Corning Foundation
Dow Corning France S.A.
Dow Corning GmbH
Dow Corning GmbH (Austria)
Dow Corning Hansil Limited
Dow Corning Hong Kong Limited
Dow Corning Iberica S.A.

Dow Corning International Sales Corporation
Dow Corning Investment S.A.
Dow Corning Japan Ltd.
Dow Corning KK
Dow Corning Limited
Dow Corning New Zealand Ltd.
Dow Corning Opthamalmics, Inc.
Dow Corning S.p.A.
Dow Corning S.A.
Dow Corning Silicon Energy Systems, Inc.
Dow Corning STI Limited
Dow Corning STI, Inc.
Dow Corning Taiwan, Inc.
Dow Corning Wright Corporation
Dow Kakoh Kabushiki Kalsha
Dow Mitsubishi Kasel Limited
Dow-United Technologies Composite Products Inc.
Dowell Schlumberger (Asia) Limited
Dowell Schlumberger (Eastern), Inc.
Dowell Schlumberger (Far East), Inc.
Dowell Schlumberger (Middle East), Inc.
Dowell Schlumberger (Western) S.A.
Dowell Schlumberger de Chile Limitada
Dowell Schlumberger de Venezuela, S.A.
Dowell Schlumberger do Brasil Servicos Petroliferos Ltda.
Dowell Schlumberger Argentina Sociedad Anonima de Mineria
Dowell Schlumberger Canada Inc.
Dowell Schlumberger China, Inc.
Dowell Schlumberger Corporation
Dowell Schlumberger Inc.
Dowell Schlumberger International, Inc.
Dowell Schlumberger Italia S.A.
Dowell Schlumberger Participation
Dowell Schlumberger Peru, S.A.
Dowell Schlumberger Statistics Limited
DowElanco

DowElanco (Malaysia) Sdn Bhd
DowElanco (NZ) Limited
DowElanco (Singapore) Pte. Ltd.
DowElanco de Colombia S.A.
DowElanco Argentina S.A.
DowElanco Australia Limited
DowElanco B.V.
DowElanco Canada Inc.
DowElanco Chile S.A.
DowElanco China Ltd.
DowElenco Denmark A/S
DowElanco Export S.A.
DowElanco GmbH
DowElanco Iberica S.A.
DowElanco Industrial Ltda.
DowElanco International Ltd.
DowElanco Italia S.r.L.
DowElanco Japan Limited
DowElanco Limited
DowElanco Mexicana, S. A. de C. V.
DowElanco Pacific Limited
DowElanco Pflanzenschutzmittel Vertriebsg.m.b.H.
DowElanco S.A.
DowElancoSverige AB
DowElanco Taiwan Ltd.
DowElanco Tarim S.A.
DowElanco Venezuela, C.A.
Drilling Services S.A.
DCU/LB Trust
DH Compounding Company
DS Technical Services, Inc.
Eagle Flying Limited
El Dorado Terminals Company
Epoxital S.R.L.
Etoxilados del Plata S.A.
Etudes Et Fabrication Dowell Schlumberger
Eurosemences, S.A.

Family Comercio e Industria de Produtos de Limpeza Ltda.
First Chemical Factoring SpA
Fort Saskatchewan Ethylene Storage Corporation
Fort Saskatchewan Ethylene Storage Limited Partnership
Generon Systems
Generon Systems A.G.
Gruppo Lopetit S.p.A.
Gruppo Lopetit Trading SRL
Gurit Essex AG
H-D Tech. Inc.
Hammer Pharma S.p.A.
Hartel Diensten B.V.
HEP CoGen, Inc.
Indian Hills Development Corp. of Carroll County
International Chemical and Mining Corporation
International Oilfield Contractors, Inc.
J.C.P. Laboratories Inc.
Joliet Marine Terminal Trust Partnership
Kern Front CoGen, Inc.
Laboratories Pharmaceuticals Biotic Maroc S.A.R.L.
Lakeside Laboratories, Inc.
Louisiana Gasification Technology, Inc.
Lucky Dow Chemical Ltd.
Marion Morrell Dow (Europe) A.G.
Marion Merrell Dow Inc.
Merrell Dow Belgium S.A.
Merrell Dow Espana S.A.
Merrell Dow France et Cie (SNC)
Merrell Dow France S.A.
Merrell Dow Funal K.K.
Merrell Dow Manufacturing Limited
Merrell Dow Pharma GmbH
Merrell Dow Pharmaceuticals (Canada) Inc.
Merrell Dow Pharmaceuticals (N.Z.) Limited
Merrell Dow Pharmaceuticals Australia Pty Ltd.
Merrell Dow Pharmaceuticals Inc.

Merrell Dow Pharmaceuticals International Inc.
Merrell Dow Pharmaceuticals K.K
Merrell Dow Pharmaceuticals Limited
Merrell Dow Pharmaceuticals Pacific Limited
Merrell Dow Portuguesa Sociedade Quimica, S.A.
Merrell Puerto Rico, Inc.
N.V. Dow Corning S.A.
Northway CoGen, Inc.
NBW Industria E. Commercio Limitada
NKY Distribution Center Inc.
Oilfield International Equipment and Supplies, Inc.
Oilfield International Equipment and Supplies, Pty. Ltd.
P.T. Pacific Indomas Plastic Indonesia
Pacific Chemical (Pakistan) Ltd (PCPL)
Perennator GmbH
Petroquimica-Dow S.A. (Petrodow)
Promix System
Prosperity IPP, Inc.
Pumptech N.V.
PACLAN FB Haushaltsartikal Vertriebs GmbH
Recon Associates, Inc.
Rio Grande CoGen, Inc.
San Joaquin CoGen, Inc.
Scotdril Offshore Company
Services Conseils Dowell Schlumberger
Services Dowell Schlumberger S.A.
Sierra CoGen, Inc.
Silcover SpA
Siliconas de Chile Limitada
Siliconlas Del Peru S.A.
Siltech Limited
Site Services, Inc.
Societe Chimique Grevis S.A.
Stony Brook CoGen, Inc.
Suministradora de Productos Quimicos, S.A.
SJC CoGen, Inc.
Technical Consultants, Inc.
The Cynara Company

Tower Assurance Company Limited
Ulsan Pacific Chemical Corporation
United AgriSeeds, Inc.
Vorakim Kimya Sanayi Ve Ticaret Anonim Sirketi
Wabiskaw Explorations Ltd.
Wickhen Products of Delaware, Inc.
Wickhen Products Inc.
Wm. H. Muller S.A.—Minerios, Comercio e Navegacao
Zhejiang Pacific Chemical Corporation